United States Court of Appeals
for the Second Circuit

APPENDIX

77-1332

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1332

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

FILED
OCT 3 1977
A. DANIEL FUSARO, CLERK

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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JUDGE/MAGISTRATE Assigned

MISDEMEANOR M/S

FELONY Fel x 207 1 Disp./Sentence 0711X

U.S. vs. X BUSIC, Zvonko

(LAST, FIRST, MIDDLE)

76CR 602

☐ JUVENILE

Case Filed Mo. Day 9 21

No. of Defs * 5

BARTELS, J

76 602 1

Yr. Docket No. Def.

U.S. MAG. CASE NO. ▶ 76 M 1822

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
49:1472 & 18:2	Aircraft Piracy	2
18:371	Conspiracy	1

CLOSED

SUPERSEDING COUNTS

BAIL • RELEASE

☐ Denied

AMT Set

$1,000,000

Date

☐ Bail Not Made

☐ Status Changed (See Docket)

☐ Fugitive

☐ Pers. Recog.

☐ PSA

conditions

☐ 10% Deposit

☒ Surety Bond

☐ Collateral

☐ 3rd Prty Cust

☐ Other

KEY DATES & INTERVALS

ARREST ▶ INDICTMENT X ▶ ARRAIGNMENT ▶ TRIAL

9-13-76

9-21-76

9/27/76

12-6-76 X

3/23/77 X

"

"

1/5/77

SENTENCE

Disposition of Charges

☑ Convicted

☐ Acquitted

☐ Dismissed

☐ On All Charges

☐ On Lesser Offense(s)

☐ WOP ☐ WP

☐ On Government Motion

MAGISTRATE

Search Warrant Issued / Return

Summons Issued / Served

Arrest Warrant Issued 9-12-76 HB

COMPLAINT ▶ 9-12-76 HB x

INITIAL APPEARANCE ▶ 9-13-76

▶ 9-23-76

OFFENSE T. 49 USC Section 1472 & 1473 - Aircraft Piracy

OUTCOME

☐ DISMISSED

☒ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

ASC 070 B

U.S. Attorney

Thomas Pattison

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J.Busic-2, Matanic-3, Pesut-4, Vlasic-5

EXCLUDABLE DELAY

DATE	PROCEEDINGS
9-13-76	Defendant arraigned before Magistrate Chrein on arrest warrant issued by Judge Bramwell - CJA Form #20 attached -
9-21-76	Indictment returned. Before Catoggio, Mag.
9-27-76	Before Bartels, J - case called - deft arraigned and enters a plea of not guilty - adjd to Oct. 13, 1976 for status report. Mark Landsman relieved as counsel for deft. Martin Ozer retained in his place. Interpreter sworn.
10/7/76	Voucher for compensation for appointment of counsel filed. (Mark A. Landsman, Esq - old counsel for deft).
10-13-76	Before BARTELS, J - case called - deft & atty present - Michael Tigar Esq. substituted as counsel for the deft- adjd to Nov. 8, 1976 for bail hearing - adjd to Dec. 1, 1976 for pre trial motions and case adjd to 12-6-76 for trial. Mr. Martin Ozer to remain as local counsel.
10/18/76	Stenographers transcript dated 10/13/76 filed.
10-21-76	Stenographer's Transcript dated 9-27-76 - Filed.

DATE	IV. PROCEEDINGS (continued) PAGE TWO	V. EXCLUDABLE DELAY
10-22-76	Notice of appearance filed	
10-26-76	By BARTELS, J - Order filed that all bail and change of venue motions must be served and filed in this court on or before Oct. 27, 1976 at 12 Noon. US Govt must file and serve any papers in opposition on or before Nov.4,1976 at 12 Noon and the hearing on the same will be held on Nov. 8, 1976 at 9:30 am. All other pre trial motions if any must be served and filed in this court on or before Nov.8 at 12 Noon and all papers in opposition must be served and filed on or before Nov. 15, 1976 at 12 Noon etc. Parties and counsel are notified that the trial in this case shall proceed on Dec. 6, 1976 as heretofore scheduled with the approval of all counsel in open court on Oct. 13,1976	
10-27-76	Notice of Motion for reduction of bail - Filed.	
10-27-76	Notice of Motion for dismissal of the indictment.-Filed.	
11/4/76	Letter dated 10/29/76 to Judge Bartels from Michael E. Tiger, Esq, counsel for deft, received from Chambers and filed [illegible]	
11-5-76	Letter filed dated Nov. 4, 1976 received from Chambers from AUSA Battison for adjournment to Nov. 8, 1976.	
11-5-76	Stenographer's Transcript dated October 28, 1976 - filed.	
11/9/76	Stenographers transctipt dated 10/28/76 filed.	
11-9-76	Govts Brief filed in opposition to defts motion to dismiss counts 1 and 2 for improper venue	
11/10/76	Notice of Motion pursuant to rule 7 and 16 for granting discovery and a bill of particulars, Notice of Motion to dismiss the indictment, Notice of motion pursuant to rules 5,12, and 41 to suppress inculpatory statemnts of deft, Notice of motion for an order suppressing evidence resulting from unlawful surveillance, Notice of Motion pursuant to rule 12 to dismiss this prosecution and or granting such other and furtherrelief asmay be just inlight of the invasion of the laywer/client relationaship, Notice of motion oursuant to rule 12 and 41 for an order to suppress physical evidence, Notice of motiom purusant to rule 14 for an order severing the trial from the deft from that of his co-defendants herein. (All motions filed and forwarded to chambers).	
11-10-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Interpreter sworn. Motion for an order granting a change of venue argued - decision reserved. Motion for a reduction of bail argued and denied.	
11-15-76	Affidavit of Thomas R. Pattison - filed.	
11-18-76	Government's Response to Deft's. motion for discovery and inspection and bill or particulars filed. (forwarded to Chambers)	
11-18-76	Stenographer's Transcript dated November 10, 1976 filed.	
11-19-76	Govts Memorandum filed in opposition to motion for severance	

NITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(Document No.)	(a)	(b)	(c)	(d)
12-8-76	Letter dated 12-6-76 filed received from Chambers from Paul Bergman, Esq and copy of voucher for expert services etc. filed				
12/14/76	Notice of motion returnable 12/20/76 at 9:30 a.m. for an order pusuant to Rule 46, T-18:3146, & 3148, to releasing the deft from custody pending appeal and trial filed and forwarded to chambers.				
12-15-76	Notice of Motion for an Order pursuant to Rule 46 releasing the defendant from custody pending appeal and trial returnable December 20, 1976 at 9:30 filed and forwarded to Calendar.				
12-16-76	Affidavit of Service filed.				
12-16-76	Affidavit of Thomas R. Pattison filed with Court Exhibits one through four attached.				
12-16-76	Affidavit of Thomas R. Pattison filed.				
12-16-76	Letter written by AUSA Pattison to Judge Bartles to amend certain statements made during oral argument upon the pending venue motion in the case. - filed.				
12-16-76	Letter written by Chief Assistant of the U.S. Attys. addressed to Judge Bartels requesting permission to submit said letter which is written for the purpose of calling attention to an error of law that appears in the memorandum submitted.				
12-16-76	Letter written by Paul Bergman to Judge Bartels on behalf of all counsel who have joined in the motion to change venue. - filed.				
12-16-76	Letter written by Michael Tigar to Judge Bartels filed confirming his statement in Court yesterday that they oppose granting permission to the Govt. to obtain hair samples from Mr. Busic.				
12-20-76	Before BARTELS,J.-Case called-Deft and counsel present-Interpreter sworn-Deft's motion for reduction of bail-Motion Argued-Motion Denied-				
12-20-76	By Bartels, J.- Order filed that the motion to release the deft. from custody pending appeal and trial is under the circumstances denied.				
12/22/76	Court Exhibit A filed.				
12/22/76	Govts brief in opposition to defts motion of reduction of bail filed.				
12/22/76	Letter dated 10/18/76 from AUSA Pattison setting date for motions filed.				
12-22-76	Deft's. Notice of Appeal filed.				
12-22-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeal.				
12-22-76	Record on Appeal certified and hand delivered to the Court of Appeal by Sara Schownwetter.				
12-27-76	Stenographer's Transcript dated December 20, 1976 filed.				
12-27-76	Acknowledgment received from the Court of Appeals for the Record on Appeal filed.				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs ZVONKO BUSIC

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Yr. Docket

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDAB (a)	(b)
11-19-76	By MXSHK BARTELS, J - Order filed that Special Agents of the F.B.I. obtain samples of hair from the deft at the MCC, NY.		
11-19-76	By BARTELS, J - Order filed that AUSA Pattison disclose to all defense counsel any statements of the defts in this case pursuant to Rule 16		
11-22-76	Notice of motion filed for dismissal of the Indictment, etc. , Inspection, that a preliminary examination be held		
11-22-76	By BARTELS, J - Order filed denying defts motion for severance.		
11-22-76	By BARTELS, J - Order filed that counts 1 and 2 of the indictment should be dismissed for lack of venue in the Eastern District of NY, etc. Prior to the filing of the order dismissing counts 1 and 2 of the indictment it is suggested that the Govt notify all defts that a prompt and speedy trial can still be had in the Eastern Dist. of NY on 12-6-76 , as originally scheduled.		
11/23/76	Govts Notice of Appeal fileed		
11/23/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.		
11-24-76	Motion for an order staying until Dec. 13, xx 1976 the order entered on Nov. 22, 1976 which dismissed counts one and two.(recvd from Chambers)		
11-24-76	Before BARTELS, J - case called - defts & counsels present - status report held and concluded - Order of 11-22-76 dismissing counts 1 and 2 is stayed for 10 days to Dec. 3, 1976		
11/24/76	By BARTELS, J. - Ordered that the order of 11/22/76 for dismissal of counts one and two of the indictment is stayed until 12/3/76.		
11-29-76	Order received from the Court of Appeals that the record be filed on or before December 22, 1976 filed.		
11-29-76	Stenographers transcript filed dated 11-24-76		
12-6-76	Notice of Motion and Affidavit filed for continuing the stay of the order dismissing counts 1 and 2 of the indictment, and staying the trial of count 3 of the indictment. (forwarded to Chambers)		
12-6-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Govt's. motion for a continuance of the stay of order of 11-22-76 until decision of court of appeals is rendered argued and granted. Deft's. motion for reduction of bail argued and denied.		
12-7-76	Stenographers transcript filed dated 12-6-76		
12-6-76	By Bartels, J - Order filed that the stay of the order dismissing counts 1 and 2 of the indictment is extended pending the determination of the appeal and that the bail in effect is contd and that the trial of counts 3 is stayed pending appeal etc.		

Interval Start Date

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

76CR 602

BUSIC, ZVONKO

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Yr.	Docket No.	Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
1-10-77	Supplemental record on Appeal certified and mailed to the Court of Appeals.				
1.28.77	Acknowledgment received from the Court of Appeals for the Supplemental Record on Appeal filed.				
1.31.77	Letter filed received from Chambers to Judge Bartels. from Michael Asen that the case is on the calendar for status report on 2.2.77 at 3:00 P.M.				
2.2.77	Before Bartels, J.- Case Called. Deft not present. Counsel present. Case adjd. to 2.24.77 for Motions. Case adjd. to 3.14.77 for Trial.				
2.3.77	Stenographer's Transcript dated February 2, 1977 filed.				
2-15-77	Copy of letter filed dated 2-11-77 recvd from Chambers to Paul Bergman, Esq. stating case will be on trial 3-14-77				
2/23/77	Request for venire de mediatate linguae of deft filed.				
2/23/77	Notice of motion returnable 2/24/77 filed for an order pursuant to Rule 7 (d) striking words from cts 1 _ 2 of the indictment.				
2/23/77	Deft memorandum of points and authroites concerning venue as a jury issue filed.				
2/23/77	Govts memorandum in opposition to defts motion to dismiss the indictment filed and forwarded to chambers.				
2/24/77	Defts notice of defense based upon mental condition and notice of motion for dismissal of count one of the indictment for lack of jurisdiction and failure to charge a violation of T-49L1472 (i)(B) filed, and forwarded to chambers.				
2/24/77	Govts memo in opposition to defts motion to suppress statements filed.				
2.24.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Deft's. motion for discovery and bill of particulars granted and denied as indicated on the record. Deft's. motion to dismiss count (1) on grounds that death penalty provision is unconstitutional. Motion argued. Decision reserved. Case adjd. to 3.7.77 at 10:00 A.M. for motions for reciprical discovery, etc. Case adjd. to 3.14.77 at 10:00 A.M. for Suppression Hearing. Case adjd. to 3.22.77 for Trial.				
2-28-77	Stenographers transcript filed dated 2-24-77				
& 3-1-77	Notice of motion filed and affidavit for an order directing the deft to submit to a ppychiatric examination etc. forwarded to Chambers				
3/1/77	Bt BARTELS, J - Memo and order filed that themotion made by defttpursuant to Rule 16 (a)(1) (A) is denied.				
3-2-77	Order received from the court of appeals that Judge Bartels Order of Dec. 20, 1976 is affirmed. Petition for Mandamus is denied.				
3-2-77	Copy of Opinion and Mandate filed received from the c of a that action is remanded for further proceedings.				
3-2-77	By BARTELS, J - Order filed that the deft shall remain at MCC unless his presence is required in the US Dist.Court, EDNY and further ordered that no writ or order issued by a judge of any other jurisdiction shall be executed until the trial of this case is concluded.				
		Interval	Start Date	Ltr	Total

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(Document No.)	(a)	(b)	(c)	(d)
3.2.77	Letter filed dated 3.2.77 Setting case for Trial 3.14.77				
3-3-77	Affidavit of Thomas Pattison/filed in response to defts motion concerning alleged improper use of the Grand Jury				
3.4.77	Notice of Readiness for Trial filed.				
3.7.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				
3.7.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Motion by Peter Zimrath, Assistant Dist. Attorney, N.Y. County to vacate order of 3.2.77 prohibiting U.S. Marshals from satisfying any writs of habeas corpus from any jurisdiction other than the Eastern District of New York argued and decision reserved. Case adjd. to 3.8.77 at 2:30 P.M.				
3.8.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Ordered that motion of Assistant District Attorney, New York County to vacate order dated 3.2.77 is denied. Motion to dismiss count one of the indictment on basis that Court lacks jurisdiction. Motion argued. Decision reserved. Case adjd. to 3.15.77 at 10:00 A.M. for Suppression Hearing.				
3-9-77	Stenographers transcript filed dated 3-7-77				
3.10.77	Memorandum of Law concerning Venue as a Jury Issue filed and forwarded to Chambers.				
3/10/77	Letter filed to atty for deft from B. Schulman, re: discovery materials.				
3-14-77	Transcript filed dated 3-8-77				
3.14.77	By Bartels, J.- Order filed that the Warden, Metropolitan Correction Center, New York make the deft. available for examination and interview by David Abrahamsen, M.D., at an appropriate place within said Metropolitan Correction Center.				
3/15/77	Before BARTELS, J .- Case called. Deft and counsel present. Hearing ordered and begun. Motion to suppress statement of deft made to FBI . Hearing ordered and begun. Wade hearing ordered and begun. Hearing adjd to 3/16/77 at 10:00 a.m.				
3/16/77	Before BARTELS, j. - Case called. Deft & Counsel present. Suppression hearing resumed. Wade hearing resumed. Hearing adjd to 3/17/77 at 10:00 a.m.				
3-17-77	Before Bartels, J - case called - deft & atty present -Interpreter Boris Marusia sworn for deft Pesut - Suppression hearings resumed - Case adjd to 3-22-77 for status report.				
3-22-77	By Bartels, J - Memorandum-decision and order filed denying suppression motion.				
3-22-77	By BARTELS, J - Memorandum-Decision and Order filed denying motion to dismiss count 1				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

BUSIC, ZVONKO,

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V. EXCLUDABLE DELAY
(a) (b) (c) (d)

DATE	PROCEEDINGS (continued) (Document No.)
3/22/77	Before BARTELS, J - Case called. Deft & Counsel present. Motion to dismiss count 1 of the indictment on grounds that the grand jury was not properly instructed - denied. Hearing concluded. Motion denied. Status conference held and concluded. Case ajdj to 3/23/77 for trial.
3-23-77	4 transcripts filed (dated Mar. 15, Mar. 16, Mar 17 and Mar. 22, 1977 reppectively)
3.23.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Jury selection ordered and begun. Jury selection adjd. to 3.23.77.
3-25-77	Letter filed dated March 24, 1977 to Hon.Judge Bartels from Edward Korman, AUSA.
3/24/77	Before BARTELS, J.- Case called. Deft & Counsel present. Jury selection resumed. Case ajd to 3/28/77 at 10:00 for jury selection.
3/28/77	Before BARTELS, J- Case called.Deft & Counsel present. Jury selection resumed.Jurors selected and sworn. Peter Schlam opens for govt. Alternate juror # 4 executed. Michael Tigar opens for deft. Case adjd to 3/29/77 at 10:00 a.m. for trial.
3-29-77	Before Bartels, J - case called - deft & counsel present - Interpreter Boris Maruna sworn for deft Pesut. Trial resumed - Trialcontd to 3-30-77.
3/30/77	Before BARTELS,J.- Case called. Deft & Counsel present. Trial resumed. Case adjd to 3/31/77 at 10:00 a.m. for trial.
3.31.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.5.77 at 10:00 A.M. for Trial.
4-4-77	Transcript filed ordered sealed by Bartels, J. dated k3-4-77.
4/4/77	Govts/ Motion pursuant to rule 17 (c) to quash various subpoenas served by deft filed and forwarded to chambers.
4-5-77	Letter filed dated 4-4-77 from AUSA Edward Korman forwarded to Chambers
4-6-77	Memorandum filed concerning defts requests to Charge 2 letters filed recvd from Chambers dated Mar 2 one dated March 11 and one dated Mar 21, 1977 (retd to Chambers)
4-5-77	Before Bartels, J - case called - deft & counsel present - Interpreter Boris Marunapresent for deft Pesut. Trial resumed - adjd to 4-6-77 ~~for trial.~~
4-k6-77	Voucher for expert services filed forwarded for payment
4-6-77	Transcript filed pages 2277 to 2297 ordered sealed by Bartels, J.
4-6-77	Before Bartels, J - case called - deft & counsel present.

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Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
	trial contd to 4-7-77.				
4/8/77	Five subpoenas to produce returned and filed - executed.				
4/8/77	Before BARTELS, J.- Case called. Deft & COUNSEL present. Trial resumed. Govt rests. Defts motions forjudgment of acquittal motion argued. Motion denied. Case ajd to 4/11/77 at 10:00 a.m. for trial.				
4/11/77	Before BARTELS, J.- Case called. Deft & Counsel present. Trial resumed. Trial continued to 4/12/77 at 10:00 a.m.				
4-12-77	Before Bartels J - case called - deft & counsel present - trial resumed - trial contd to 4-13-77				
4-13-77	Before Bartels, J - case called - trial resumed - trial contd to 4-13-77				
4-14-77	Before Bartels, J - case called - trial resumed - trial contd to 4-18-77				
4-16-77	Memorandum of Law filed in support of motion of US to preclude deft Busic from offering the testimony of Dr. Bernard Diamond - copy of letter filed from Edward Korman, AUSA dated 4-11-77.				
4-15-77	Supplemental record received from the c of a and filed. acknowldgment mailed to Clerk				
4/18/77	Govts request to charge, memorandum in support of defts defense of mental conditon in consistent with the mental element for the offenses charge in the indictment, and notice of motion for an order dismissing the grounds of gross prosecutorial misconduct, etc. filed and forwarded to chambess.				
4.18.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft's. motion for mistrial denied. Trial continued to 4.19.77 at 10:00 A.M.				gp
4.19.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.20.77 at 10:00 A.M. for Trial.				gp
4.20.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.21.77 at 10:00 A.M.				gp
4.21.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Deft's. Trial resumed. Trial adjd. to 4.25.77 at 10:00 A.M.				gp
4/25/77	Defts requested instruction No. 66 filed.				t k
4/25/77	Before Bartels, J-case called-defts & counsel present-trial resumed-case adjd to 4/26/77.BLJ				
4.26.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.27.77 at 9:15 A.M. for Trial.				gp
4-27-77	Deft Zvonko Busic's Memorandum in support of Instructions Nos. 37, 40, 41, 42, 43 & 66 filed.				
4/27/77	Before Bartels, J-case called-defts & counsel present trial resumed-govt rests-case adjd to 4/28/77 for trialJLJ				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

AO 256A

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

BUSIC, Zvonko

76 Yr. | 602 Docket No. | 6 Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
4.28.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft's. motion for Judgment of acquittal. Motion argued. Motion denied. Case adjd. to 5.2.77 at 10:00 A.M. for Trial.				gp
5.2.77	Affidavit of Peter R. Schlam filed and forwarded to Chambers.				gp
5.2.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up. Order of sustenance signed. Deft's. motion for mistrial - motion denied. Order of Transportation signed. Case adjd. to 5.3.77 at 9:00 A.M. for Trial.				gp
5.3.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft. sums up. Govt. sums up on rebuttal. Order of sustenance signed. Judge charges Jury. Alternates discharged. Jury retires at 5:30 P.M. to deliberate. Order of sustenance signed. Jury returns at 7:35 P.M. to have testimony read to them. Orders of Transportation signed. Order of Lodging signed. (2) Orders of sustenance signed. Jury retires for further deliberations. Case adjd. to 5.4.77 at 10:00 A.M. for Trial.				gp
5.3.77	Before Bartels, J.- Case Called. Hearing in the matter of Henry McGuinness held. Contempt proceedings dismissed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed. (BREAKFAST)				gp
5.4.77	By Bartels, J.- Order of Sustenance filed. (DINNER)				gp
5.4.77	By Bartels, J.- Order of Transportation filed.				gp
5.4.77	By Bartels, J.- Order of Lodging filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	Letter filed received from Chambers addressed to Judge Bartels from Pasquale D. Lotesta, M.D. in reference to Henry J. McGuinness' drowsiness during the daytime.				gp
5.4.77	By Bartels,,J.- Order of Transportation filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury deliberations continued. Jury returns to Courtroom at 10:25 A.M. to hear testimony Order of Sustenance signed. Jury retires at 11:05 A.M. to continue deliberation. Order of sustenance signed. Order of Sustenance signed. Order of Transportation signed. Order of Lodging signed. Jury returns to Courtroom at 9:00 P.M. to hear testimony. Trial continued to 5.5.77 at 10:00 A.M. for Trial.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Loding filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed .				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Transportation filed.				gp

over........

Interval | Start Date / End Date | Ltr. Code | Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

Zvonko Busic

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5-5-77	Before Bartels, J - case called - deft & counsel present - Jury resumes deliberations - Jury returns with a verdict of guilty on counts 1, 2 & 3 - sentence adjd without date. trial concluded - Jury discharged.				
5-5-77	3 orders of sustenance filed				
5.9.77	Notice of Motion to Maintain Deft in Federal Custody filed and forwarded to Chambers.				gp
5.9.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				gp
5-9-77	Two transcripts filed ordered sealed by the Court Dated 3-23 and 3-24-77 respectively.				
5.10.77	By Bartels, J.- Order filed that the Order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5,11,77 for 1 day for purpose of appearing in pre-trial proceedings & also ordered that deft. shall remain in continuous custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.11.77 is concluded.				gp
5.10.77	By Bartels, J.- Amended Order filed that the Order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5,12,77 for 1 day for purpose of appearing in pretrial proceedings & also ordered that deft. shall remain in custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.12.77 is concluded.				gp
5-11-77	2 transcripts filed, one dated May 4 and one dated May 5, 1977. rs.				
5.19.77	Notice of Motion for an order pursuant to Rules 29, 33, and 34 granting a judgment of acquittal, granting a new trial returnable 5.23.77 at 4:30 P.M. filed and forwarded to Chambers.				gp
5-23-77	Before Bartels, J - case called - deft & atty present - Motion to set aside verdict and for judgment of acquittal - motion argued and denied - case adjd to July 20, 1977 at 9:30 am for sentence.				
5-25-77	Transcript filed dated May 23, 1977.				
6.1.77	Affidavit of Edward R. Korman filed.(received from Chambers.)				gp
6.1.77	Affidavit of Barry E. Schulman filed received from Chambers.				gp
6.1.77	Memorandum in Support of Motion by the District Attorney, New York County, to vacate the Court's Order of March 2nd, 1977 filed received from Chambers.				gp
6.1.77	Memorandum of Law in Support of the Motion of the United States to Preclude the deft. from offering the proferred testimony of Dr. Bernard L. Diamond filed received from Chambers. (Copy)				gp
6.1.77	Notice of Motion for an order precluding the government from using as evidence (1) the 2-page xerox document (2)the fingerprint testimony concerning that document etc. filed received from Chambers.				gp
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

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continued....

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

BUSIC, Zvonko

76	602	2
Yr.	Docket No.	Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
6.1.77	Proposed questions for the Jury Panel filed received from Chambers.				gp
6.1.77	Deft's. Special Questions to be posed by Counsel on Individual Voir Dire filed received from Chambers.				gp
6.1.77	Proposed Voir Dire Question filed received from Chambers.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 5.8.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael E. Tigar dated 5.27.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael E. Tigar dated 5.10.77 with other material attached.				gp
6.1.77	Letter filed (COPY) received from Chambers addressed to Peter Schlam from Michael E. Tigar dated 2.14.77.				gp
6.1.77	Letter filed received from Chambers addressed to Michael E. Tigar from Peter R. Schlam dated 3.2.77.				gp
6.1.77	Affidavit in Response to Deft Busic's. Motion concerning Alleged improper use of the Grand Jury filed received from Chambers.				gp
6.1.77	Copy of Memorandum of Law in Support of the motion of the United States to Preclude the deft. from Offering the Proferred testimony of Dector Bernard L. Diamond filed received from Chambers.				gp
6.1.77	Unsigned copy of Letter filed received from Chambers. addressed to Judge Bartels from Edward R. Korman dated 4.11.77 with other material attached.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.25.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.26.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.29.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 2.28.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 3.18.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Peter L. Zimroth dated 5.9.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Martin Elefant and Paul B. Bergman dated 5.24.77.				gp
6.3.77	By Bartels, J.- Order of Transportation filed.				gp
6/6/77	Voucher for expert services filed and forward to admin office for payment.lj				
6.07.77	Stenographer's Transcript dated May 2nd, 1977 filed.				gp
6.07.77	Stenographer's Transcript dated April 21, 1977 filed.				gp
6.07.77	Stenographer's Transcript dated April 20th, 1977 filed.				gp
6.07.77	Stenographer's Transcript dated May 4th, 1977 filed.				gp
	over......				
		Interval	Start Date End Date	Ltr. Code	Total Days

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(Document No.)	(a)	(b)	(c)	(d)
6.10.77	Stenographer's Transcript dated April 11th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 12th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 13th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 14th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 18th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 19th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 28th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 29th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 30th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 31st, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 5th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 6th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 7th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 25th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 26th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 27th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 28th, 1977 filed.				gp
7-12-77	Notice filed setting case for sentence on July 20, 1977.				
7-20-77	Before BARTELS, J - case called - deft & atty M.Tigar present - deft sentenced to life imprisonment on count 1; and to imprisonment for 5 years on count 3 - sentences to run concurrently. Court recommends that deft serve sentence with co-deft Julienne Busic at the Federal Corr. Inst. Terminal Island, Cal.				
7-20-77	Judgment and commitment filed - certified copies to Marshal.				
7-20-77	Notice of appeal filed - docket entries and duplicate of notice mailed to the court of appeals.				
7.28.77	Memorandum of Law on Behalf of the United States filed received from Chambers.				gp
8/8/77	Scheduling order from C of A that the record and appeal be docketed and filed on or before 8/10/77.jlj				
8-10-77	Certified Record on appeal handed to Elizabeth De Cristofaro, Sec. to Paul Bergman, for delivery to the court of appeals.				
8-15-77	Acknowledgment filed received from the court of appeals for receipt of record on appeal.				
8-15-77	Judgment & commitment retd and filed - deft. del to MCC.NY				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

U.S. District Court

JUDGE/MAGISTRATE Assigned

DOCKET 000013

U.S. vs BUSIC, Julianne

9 21 76 602 2

BARTELS, J.

5

▶ 76 M 1822

MISDEMEANOR Mis ☐

FELONY Fel X 207 1 0711X

CLOSED

OFFENSES CHARGED

U.S. TITLE/SECTION	OFFENSES CHARGED	
49:1472 & 18:2	Aircraft Piracy	2
18:371	Conspiracy	1

1,000,000

Conditions

☐ Deposit

☒ Surety Bond

☐ Collateral

☐ 3rd Prty Cust ☐ Other

II. KEY DATES & INTERVALS

ARREST ▶ INDICTMENT X ▶ ARRAIGNMENT

U.S. Custody: 9-13-76

Summons Served

First Appearance

High Risk Date

In Charging District

Information 9-21-76

9-27-76

X 11/6/76

SENTENCE

WCP WP

MAGISTRATE

	DATE	INITIAL NO.
Search Warrant Issued / Ret.		
Summons Issued / Served		
Arrest Warrant Issued	9-12-76	HB
COMPLAINT ▶	9-12-76	HB
OFFENSE (in Complaint)	T. 49 USC Sections 1472 & 1473 - Aircraft Piracy	

INITIAL APPEARANCE ▶ 9-13-76

PRELIMINARY EXAMINATION OR REMOVAL HEARING ▶ 9-23-76

ASC 070B

DISMISSED

X HELD FOR G.J. OR OTHER PROCEEDING IN THIS DISTRICT

WAIVED

X

U.S. Attorney or Asst

Thomas Pattison

ATTORNEYS

X

David Rudolf, Esq.
legal Aid Society
26 Court St. B'klyn, NY

Michael I. Asen
217 Broadway,
N.Y., N.Y.

David Rudo
200 W 79 S
N.Y., N.Y.

* Show last names and suffix numbers of other defendants

Z.Busic-1, Matanic-3, Pesut-4, Vlasic-5

EXCLUDABLE DELAY

DATE	PROCEEDINGS
9-13-76	Defendant arraigned before Judge Chrein on warrant Issued by Judge Bramwell - Order appointing counsel attached.
9-21-76	Indictment returned. Before Catoggio, Mag.
9=27=36	Before Bartels, J - case called - deft & counsel present - deft arraigned and enters a plea of not guilty - adjd to Oct. 13 for status report. Interpreter sworn.
10-13-76	Before BARTELS, J - case called - deft & counsel present - case adjd to Nov. 8, 1976 for bail hearing; adjd to 12-1-76 for pre trial motions and adjd to 12-6-76 for trial
10/18/76	Stenographers transcript dated 10/13/76 filed.
10-21-76	Stenographer's Transcript dated 9-27-76 - Filed.
1026-76	By BARTELS, J - Order filed that all bail and change in venue motions must be served and filed in this court on or before ~~Oct.~~ 27, 1976 at 12 Noon. US Govt must file and serve any papers in opposition on or before Nov. 4, 1976 at 12 Noon and the hearing on the same will be held will be held on Nov. 8, 1976 etc.(see order as indicated)

[illegible] EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	IV. PROCEEDINGS (continued) PAGE TWO	V. EXCLUDABLE DELAY
10-27-76	Notice of Motion for dismissal of the indictment - Filed.	
10/28/76	Notice of motion to dismiss counts one and two for improper venue, and a notice of motion for reductioln of bail both returnable 11/8/76 at 9:30 a.m. filed and forwarded to chambers.	
11-5-76	Letter filed dated Nov. 4, 1976 received from Chambers from AUSA Pattison for adjournment to Nov. 8, 1976	
11-5-76	Stenographer's Transcript dated October 28, 1976 - filed.	
11/9/76	Stenographers transcript dated 10/28/76 filed.	
11-9-76	Govts Brief filed in opposition to defts motion to dismiss counts one and two for improper venue	
11-10-76	Notice of motion filed to suppress evidence generated by unlawful surveillance;Notice of motion filed to suppress evidence(documents, luggage)Notice of motion filed for Discovery and Bill of Particulars; Notice of motion filed for severance; Notice of motion filed to dismiss etc. (all forwarded to Chambers)	
11-10-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Interpreter sworn. Motion for an order granting a change of venue argued. - decision reserved. Motion for a reduction of bail argued and denied.	
11-15-76	Affidavit of Thomas R. Pattison - filed.	
11-18-76	Stenographer's Transcript dated November 10, 1976 filed.	
11-19-76	Govts Memorandum filed in opposition to defts motion for severance	
11-19-76	By Bartels, J - Order filed that Special Agents of the F.B.I. obtain samples of hair from the deft at the MCC, NY.	
11-19-76	By Bartels, J - Order filed that AUSA Pattison disclose to all defense counsel any statements of defts in this case provided to any one deft under Rule 16	
11-22-76	By Bartels, J - Order filed denying motion for severance	
11-22-76	Before Bartels, J - Order filed that counts 1 and 2 should be dismissed for lack of venue. Prior to the filing of the order dismissing counts 1 and 2 it is suggested that the Govt notify all defts that a prompt and speedy trial can still be had in the Eastern Dist. of NY on 12-6-76 as originally scheduled.	
11/23/76	Notice of Appeal filed.	
11/23/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.	
11-24-76	Motion for an order staying until Dec. 13, 1976 the order entered on 11-22-76 dismissing counts 1 and 2. (recvd from Chambers)	
11-24-76	Before Bartels, J - case called - defts & attys present - status report held and concluded - Order of 11-22-76 dismissing counts 1 and 2 is stayed for 10 days to 12-3-76	

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

76 CR 602 BUSIC, JULIANNE

76 | 6C
Yr. | Docket

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABI (a)	(b)
11/24/76	By BARTELS, J.- Ordered that the order of 11/22/76 for dismiasal of counts one and two of the indictment is stayed until 12/3/76.		
11-29-76	Order received from the Court of Appeals that the record be filed on or before December 22, 1976 filed		
11-29-76	Stenographers transcript filed dated 11-24-76		
12-6-76	Notice of Motion and Affidavit filed for continuing the stay of the order dismissing counts 1 and 2 of the indictment and staying the trial of count 3 of the indictment. (forwarded to Chambers)		
12-6-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Govt's. motion for a continuance of the stay of order of 11-22-76 until decision of court of appeals is rendered argued and granted. Deft's. motion for reduction of bail argued and denied.		
12-7-76	Stenographers transcript filed dated 12-6-76		
12-8-76	By BARTELS, J - Order filed that the stay of the order dismissing counts 1 and 2 is extending pending determination of the appeal and that the bail is contd and the trial of count 3 is stayed pending appeal.		
12-15-76	Notice of Motion for an Order pursuant to Rule 46 releasing the defendant from custody pending appeal and trial returnable December 20, 1976 at 9:30 A.M. filed and forwarded to Calendar.		
12-16-76	Affidavit of Service filed.		
12-16-76	Affidavit of Thomas R. Pattison filed with Court Exhibits one through four attached.		
12-16-76	Affidavit of Thomas R. Pattison filed.		
12-16-76	Letter written by AUSA Pattison to Judge Bartels to amend certain statements made during oral argument upon the pending venue motion in the case. - filed.		
12-16-76	Letter written by Chief Assistant of the U.S. Attys. addressed to Judge Bartels requesting permission to submit said letter which is written for the purpose of calling attention to an error of law that appears in the memorandum submitted.		
12-20-76	Before BARTELS, J.-Case called-Deft and counsel present-Interpreter sworn-Deft's motion for reduction of bail-Motion Argued-Motion Denied-		
12-20-76	By Bartels, J.- Order filed that the motion to release the deft. from custody pending appeal and trial is under the circumstances denied.		
12/22/76	Letter dated 10/18/76 from AUSSA Pattison setting date for motions filed.		
12/22/76	Govts brief in opposition to defts motion for reduction of bail filed.		
12/22/76	Court Exhibit A filed.		
12/22/76	Letter dated 12/9/76 to Juge Bartesl, form atty for deft, re: order to obtain hair samples on deft., filed		

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLU (a)	(b)	DELAY (c)	(d)
12-22-76	Deft's. Notice of Appeal filed.				
12-22-76	Docket entries and duplicate of Notice of appeal mailed to the Court of Appeal.				
12-22-76	Record on Appeal certified and hand delivered to the Court of Appeal by Sara Schowmwetter.				
12-27-76	Stenographer's Transcript dated December 20, 1976 filed.				
12-27-76	Acknowledgment received from the Court of Appeal for the record on Appeal filed.				
1-10-77	Supplemental record on appeal certified and mailed to the Court of Appeals.				
1.28.77	Acknowledgment received from the Court of Appeals for the Supplemental Record on Appeal filed.				
1.31.77	Letter filed received from Chambers to Judge Bartels from Michael Asen that the case is on the calendar for status report on 2.2.77 at 3:00 P.M.				
2.2.77	Before Bartels, J.- Case Called. Deft not present. Counsel present. Case adjd. to 2.24.77 for Motions. Case adjd. to 3.14.77 for Trial. Michael Asen & David Rudolph substituted as Counsel.				
2.2.77	Notice of Appearance filed.				
2.2.77	Notice of Appearance filed.				
2.2.77	By Bartels, J.- Order filed that MICHAEL IRA ASEN be substituted as attorney in place and instead of William Gallagher.				
2.3.77	Stenographer's Transcript dated February 2, 1977 filed.				
2-15-77	Copy of letter filed dated 2-11-77 recvd from Chambers to Paul Bergman, Esq. stating case will be on trial 3-14-77				
2/18/77	Memorandum filed to support defts motion to dismiss indictment filed and forwarded to chambers.				
2/24/77	Govts memo in opposition to defts motion to suppress statements filed.				
2.24.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Deft's. motion for discovery and bill or particulars granted and denied as indicated on the record. Deft's. motion to dismiss count (1) on grounds that death penalty provisions is unconstitutional. Motion argued. Decision reserved. Case adjd. to 3.7.77 at 10:00 A.M. for motions on reciprical discovery, etc. Case adjd. to 3.14.77 for Suppression Hearing, at 10:00 A.M. Case adjd. to 3.22.77 for Trial.				
2-28-77	Stenographers transcript filed dated 2-24-77				
3/1/77	By BARTELS, J - Memo andorder filed that the motion made by deft pursuant to Rule 16 (a)(1) (A) is denied.				
3-2-77	Order received from the court of appeals that Judge Bartels Order of Dec. 20, 1976 is hereby affirmed Petition for mandamus is denied.				
3-2-77	Copy of Opinion and Mandate filed received from the c of a that action is hereby remanded to the District court for further proceedings				
3-2-77	By BARTELS, J - Order filed that the deft remain at MCC unless his presence is required in the uS DC, ED NY, and further ordered that no writ or order issued by a judge of any other jurisdiction shall be executed until the trial in this case is over				
		Interval	Start Date	Ltr.	Total

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
	Hearing concluded Motion denied Status conference held anc concluded. Case adjd to 3/23/77 for trial.				
3-23-77	4 transcripts filed dated Mar. 15, Mar. 16, Mar. 17 and Mar. 22, 1977 respectively.				
3.23.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Jury selection ordered and begun. Jury selection adjd. to 3.23.77.				
3-25-77	Letter filed dated March 24, 1977 received from Asst. U.S. Atty. Korman to Hon.Judge Bartels re letter submitted by the deft. etc.				
3/25/77	Before BARTELS, J- Case called. Deft &Counsel present. Jury selection resumed. Case adjd to 3/28/77 at 10:00 for jury selection. Suppression hearing on search of luggage of deft resumed. Hearing concluded. Decision reserved. Case ajd to 3/28/77 for trial.				
3/28/77	Before BARTELS,J.= Case called. Deft & Counsel present. Jury selection resumed. Jurors selected and sworn. Peter Schlam opensfor govts. Michael Asen opensfor deft. Case cont.to 3/29/77 at 10:00 a.m. for trial.				
3-29-77	Before Bartels, J - case called - deft & counsel present - Interpreter B.Maruna present - trial resumed - trial contd to 3-30-77.				
3/30/77	Before BARTELS,J.- ase called. Deft & Counsel present. Trial resumed. Case adjd to 3/31/77 at 10:00 a.m. for trial.				
3.31.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.5.77 at 10:00 A.M. for Trial.				
4-4-77	transcript filed ordered sealed by Bartels, J. dated 3-4-77				
4-5-77	letter filed forwarded to Chambers dated 4-4-77 from AUSA Korman				
4-5-77	Memorandum filed (deft Busic) 2 letters filed received from Chambers dated Mar. 2 one dated Mar. 11 and one dated Mar. 21, 1977 (retd to Chambers)				
4-5-77	Before Bartels, J - case called - deft & counsel presetn - trial resumed - adjd to 4-6-77.				
4-6-77	Voucher for compensation for expert services filed forwarded for payment				
4-6-77	Transcript filed pages 2277 to 2297 ordered sealed by Bartels, J				
4-6-77	Befoee Bartels, J - case called - deft & atty present - trial contd to 4-7-77.				
4/8/77	Before BARTELS,J,. - Case called. Deft & Counsel present. Tria resumed. Govt rests. Defts motions for judgment of acquittal motion argued. Motion denied. Case adjd to 4/11/77 at 10:00 a.m. for trial.				
	continued.......				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

BUSIC, JULIANNE

76 | 602 | 2
Yr. | Docket No. | Def.

DATE	PROCEEDINGS (continued) (Document No.)
3.2.77	Letter filed dated 3.2.77 Setting case for Trial 3.14.77
3.4.77	Notice of Readiness for Trial filed.
3.7.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.
3.7.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Motion by Peter Zimrath, Assistant District Attorney, N.Y. County to vacate order of 3.2.77 prohibiting U.S. Marshals from satisfying any writs of habeas corpus from any jurisdiction other than the Eastern District of New York argued and decision reserved. Case adjd. to 3.8.77 at 2:30 P.M.
3.8.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Ordered that motion of Assistant District Attorney, New York County to vacate order dated 3.2.77 is denied. Motion to dismiss count one of the indictment on basis that Court lacks jurisdiction. Motion argued. Decision reserved. Motion of deft. to dismiss on grounds of undue and prejudicial publicity before the Grand Jury. Motion argued. Motion denied. Case adjd. to 3.15.77 at 10:00 A.M. for Suppression Hearing.
3-9-77	Stenographers transcript filed dated 3-7-77
3.10.77	Memorandum of Law concerning Venue as a Jury Issue filed and forwarded to Chambers.
3/10/77	Letter filed to atty for deft from B. Schulman, re discovery materials.
3-14-77	Transcript filed dated 3-8-77
3/15/77	Before BARTELS, J. - Case called. Deft & Counsel present. Hearing ordered and begun. Motion to suppress statement made to FBI and for search of luggage. Hearing ordered and begun. Wade hearing ordered and begun. Hearing adjd to 3/16/77 at 10:00 a.m.
3/16/77	Before BARTELS, J.- Case called. Deft & Counsel present. Suppression hearings resumed. Wade hearing resumed. Hearing adjd to 3/17/77 at 10:00 a.m.
3-17-77	Before Bartels, J - case called - deft & atty present - suppression hearing resumed - case adjd to 3-22-77 for status report.
3-22-77	By BARTELS, J - Memorandum-Decision and Order filed denying suppression motion.
3-22-77	By BARTELS, J - Memorandum-Decision and Order filed denying motion to dismiss count 1.
3/22/77	Before BARTELS, J. - Case called Deft & Counsel present. Motion to dismiss count 1 o fthe indictment on gouunds that the grand jury was not properly instructed - denied. Re hearing ordered and begun on motion to suppress search of luggage of deft.

V. EXCLUDABLE DELAY (a) (b) (c) (d)

AO 256A

Interval | Start Date End Date | Ltr. Code | To Da

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

BUSIC, Julianne

Yr.	Docket No.	Def.
76	602	2

V. EXCLUDABLE DELAY

DATE	PROCEEDINGS (continued) (Document No.)	(a)	(b)	(c)	(d)
4/11/77	Before BARTELS,J. - Case called. Deft & COUSNel present. Tiail resumed. Trial continued to 4/12/77 at 10:00 a.m.				
4-12-77	Before Bartels, J - case called - trial resumed - Trial contd to 4-13-77				
4-13-77	Before Bartels, J - case called - trial resumed - trial contd to 4-14-77.				
4-14-77	Before Bartels, J - case called - trial resumed - trial contd to 4-18-77/				
4-15-77	~~Memorandum of law filed~~ Copy of letter filed from AUSA Korman dated 4-11-77.				
4-15-77	Supplemental record received from the court of appeals acknowledgment mailed to Clerk				
4/18/77	Govts request to charge, and notice of motion for an order dismissing the grounds of gross prosecutorial misconduct etc, filed and forwarded to chambers.				
4.18.77	Before Bartels , J.- Case Called. Deft. & Counsel present. Trial resumed. Trial continued to 4.19.77 at 10:00 A.M.				gp
4.19.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.20.77 at 10:00 A.M. for Trial.				gp
4.20.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.21.77 at 10:00 A.M.				gp
4.21.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.25.77 at 10:00 A.M.				gp
4/25/77	Before Bartels, J-case called-defts and counsel present. Trial resumed-case adjd to 4/26/77.JLJ				
4.26.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.27.77 at 9:15 A.M. for Trial.				gp
4-27-77	Deft Zvonko Busic's memorandum in support of instructions Nos. 37, 40,41, 43, 42 & 66 filed.				
4/27/77	Before Bartels, J-case called-defts and counsel present trial resumed-govts rests-case adjd to 4/28/77 for trial.JLJ				
4.28.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft's. motion for Judgment of acquittal. Motion argued. Motion denied. Case adjd. to 5.2.77 at 10:00 A.M. for Trial.				gp
5.2.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up. Order of sustenance signed. Deft's. motion for mistrial - motion denied. Order of Transportation signed. Case adjd. to 5.3.77 at 9;00 A.M. for Trial.				
	over........				
		Interval (per Section ...)	Start Date End Date	Ltr. Code	Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET ~~XKXXXXXXXXX~~ Julienne Busic

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5.3.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft. sums up. Govt. sums up on rebuttal. Order of sustenance signed. Judge charges Jury. Alternates discharged. Jury retires at 5:30 P.M. to deliberate. Order of sustenance signed. Jury returns at 7:35 P.M. to have testimoney read to them. Orders of Transportation signed. (2) Orders of sustenance signed. Order of Lodging signed. Jury retires for further deliberations. Case adjd. to 5.4.77 at 10:00 A.M. for Trial.				g
5.3.77	Before Bartels, J.- Case Called. Hearing in the matter of Henry McGuinness held. Contempt proceedings dismissed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed. (BREAKFAST)				g
5.4.77	By Bartels, J.- Order of Sustenance filed. (DINNER)				g
5.4.77	By Bartels, J.- Order of Transportation filed.				gp
5.4.77	By Bartels, J.- Order of Lodging filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	Letter filed received from Chambers addressed to Judge Bartels from Pasquale D. Lotesta, M.D. in reference to Henry J. McGuinness' drowsiness during the daytime.				g
5.4.77	By Bartels, J.- Order of Transportation filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury deliberations continued. Jury returns to Courtroom at 10:25 A.M. to hear testimoney Order of Sustenance signed. Jury retires at 11:05 A.M. to continue deliberation. Order of sustenance signed. Order of Sustenance signed. Order of Transportation signed. Order of Lodging signed. Jury returns to Courtroom at 9:00 P.M. to hear testimony. Trial continued to 5.5.77 at 10:00 A.M. for Trial.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Lodging filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed. (LUNCH)				gp
5.4.77	By Bartels, J.- Order of Transportation filed.				gp
5-5-77	Before Bartels, J - case called - deft & atty present - Jury resumes deliberations - Jury returns with a verdict of guilty on counts 1, 2 & 3 - sentence adjd without date. trial concluded - Jury discharged.				
5-5-77	By Bartels, J - 3 Orders of sustenance filed.				
5.9.77	Notice of Motion to Maintain Deft. in Federal Custody filed and forwarded to Chambers.				gp
5.9.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				gp
5-9-77	2 transcripts filed ordered sealed by the court. (dated Mar. 23 and Mar. 24, 1977 respectively)				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

AO 256A

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

BUSIC, Julianne

DATE	PROCEEDINGS (continued) (Document No.)	
5.10.77	By Bartels, J.- Order filed that the Order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.11.77 for 1 day for purpose of appearing in pre-trial proceedings & also ordered that deft. shall remain in continuous custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.11.77 is concluded.	gp
5.10.77	By Bartels, J.- Amended Order filed that the order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.12.77 for 1 day for purpose of appearing in pretrial proceedings & also ordered that deft. shall remain in custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.12.77 is concluded.	gp
5-11-77	2 transcripts filed one dated May 4 and one dated May 5, 1977.	
5/18/77	Notice of motion for an order granting a motion to set asisde the verdict and enter a judgment of acquittal etc.jlj (Re/ 5/23/77)	
5.19.77	Notice of Motion for an order pursuant to Rules 29, 33, and 34 granting a judgment of acquittal, granting a new trial returnable 5.23.77 at 4:30 P.M. filed and forwarded to Chambers.	gp
5-23-77	Before Bartels, J - case called - deft & atty present - motion to set aside verdict and for judgment of acquittal - motion argued and denied - case adjd to July 20, 1977 for sentence.	
5-25-77	Transcript filed dated May 23, 1977.	
6.1.77	Affidavit of Edward R. Korman filed received from Chambers.	gp
6.1.77	Affidavit of Barry E. Schulman filed received from Chambers.	gp
6.1.77	Memorandum in Support of Motion by the District Attorney, New York County, to vacate the Court's Order of March 2nd, 1977 filed received from Chambers.	gp
6.1.77	Notice of Motion for an order precluding the government from using as evidence (1) the 2-page xerox document etc. filed received from Chambers.	gp
6.1.77	Proposed questions for the Jury Panel filed received from Chambers.	gp
6.1.77	Proposed Voir Dire Questions filed received from Chambers.	gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 5.8.77.	gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael E. Tigar dated 5.10.77 with other material attached.	gp
6.1.77	Letter filed (COPY) received from Chambers addressed to Peter Schlam from Michael E. Tigar dated 2.16.77.	gp

over......

Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

BUSIC, Julienne

76 Yr. | 602 Docket No

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE (a)	(b)
6.10.77	Stenographer's Transcript dated April 5th, 1977 filed.		
6.10.77	Stenographer's Transcript dated April 6th, 1977 filed.		
6.10.77	Stenographer's Transcript dated April 7th, 1977 filed.		
6.10.77	Stenographer's Transcript dated April 25th, 1977 filed.		
6.10.77	Stenographer's Transcript dated April 26th, 1977 filed.		
6.10.77	Stenographer's Transcript dated April 27th, 1977 filed.		
6.10.77	Stenographer's Transcript dated April 28th, 1977 filed.		
7-12-77	Notice filed setting case for sentence on 7-20-77		
7-20-77	Before BARTELS, J - case called - deft & atty David Rudolph present - deft sentenced in count 1 to life imprisonment. Deft sentenced in count 3 for a period of 5 years - sentences in counts 1 and 3 to run concurrently and pursuant to T-18, U.S.C.Sec. 4205(b)(1) the deft shall become eligible for parole at the expiration of 8 years. Court recommends that deft serve sentence with co-deft Zvonko Busic at the F,C.I., Terminal Island, California.		
7-20-77	Judgment & commitment filed - certified copies to Marshal.		
7-20-77	Notice of appeal filed - Docket entries and duplicate of notice mailed to the court of appeals.		
7-25-77	Transcript filed dated 7-21-77.		
7.28.77	Memorandum of Law on behalf of the United States filed received from Chambers..		
8/8/77	Scheduling order from C of A that the record be filed onor before 8/10/77.jlj		
8-10-77	Record on appeal certified and handed to Elizabeth De Cristofaro, Sec. to Paul Bergman, for delivery to the court of appeals.		
8-15-77	Acknowledgment filed received from the court of appeals for receipt of recordon appeal.		
8-15-77	Judgment & commitment retd and filed - deft. del. to MCC. NY.		
8.19.77	Notice of Appeal filed by the Chief Assistant United States Attorney and forwarded to the Court of Appeals.		

Interval | Start Date

ED STATES DISTRICT COURT
NAL DOCKET

BUSIC, Julienne

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
1.77	Letter filed received from Chambers addressed to Michael E. Tigar from Peter R. Schlam dated 3.2.77.				gp
1.77	Affidavit in Response to Deft. Busic's. Motion concerning Alleged improper use of the Grand Jury filed received from Chambers.				gp
1.77	Letter filed (COPY) received from Chambers. addressed to Judge Bartels from Edward R. Korman dated 3.24.77.				gp
1.77	Letter filed received from Chambers (COPY) addressed to Judge Bartels from Edward R. Korman dated 3.23.77.				gp
1.77	Letter filed received from Chambers addressed to Judge Bartels, from Edward R. Korman dated 3.25.77.				gp
1.77	Unsigned copy of Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.11.77 with other material attached.				gp
1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.25.77.				gp
1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.29.77.				gp
1.77	Letter filed received from Chambers addressed to Judge Bartels from David Rudolf and Michael Ira Asen dated 3.8.77.				gp
1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 2.28.77.				gp
1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 3.18.77.				gp
1.77	Letter filed received from Chambers addressed to Judge Bartels from David Rudolf and Michael Ira Asen dated 3.24.77.				gp
.1.77	Letter filed received from Chambers addressed to Judge Bartels from Peter L. Zimroth dated 5.9.77.				gp
.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael Ira Asen dated 5.27.77.				gp
.1.77	Letter filed received from Chambers addressed to Judge Bartels from Martin Elefant and Paul B. Bergman dated 5.24.77.				gp
.3.77	By Bartels, J.- Order of Transportation filed.				gp
.07.77	Stenographer's Transcript dated May 2nd, 1977 filed.				gp
.07.77	Stenographer's Transcript dated April 21, 1977 filed.				gp
.07.77	Stenographer's Transcript dated April 20th, 1977 filed.				gp
.07.77	Stenographer's Transcript dated May 4th, 1977 filed.				gp
10.77	Stenographer's Transcript dated April 11th, 1977 filed.				gp
10.77	Stenographer's Transcript dated April 12th, 1977 filed.				gp
10.77	Stenographer's Transcript dated April 13th, 1977 filed.				gp
10.77	Stenographer's Transcript dated April 14th, 1977 filed.				gp
10.77	Stenographer's Transcript dated April 18th, 1977 filed.				gp
10.77	Stenographer's Transcript dated April 19th, 1977 filed.				gp
10.77	Stenographer's Transcript dated March 28th, 1977 filed.				gp
10.77	Stenographer's Transcript dated March 29th, 1977 filed.				gp
10.77	Stenographer's Transcript dated March 30th, 1977 filed.				gp
10.77	Stenographer's Transcript dated March 31st, 1977 filed.				gp

over..-....

56A	Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

JUDGE MAGISTRATE Assigned

U.S. vs MATANIC, Petar

000024

BARTELS, J.

FELONY Fel x 207 District 1 Office 0711X

76CR 602

9 21 5

76 602 3 Def

▶ 75 11 1822

U.S. TITLE-SECTION		
49:1472 & 18:2	Aircraft Piracy	2
	Conspiracy	1

CLOSED

$1,000

X Surety Bond

Fugitive

10% Deposit

Collateral

3rd Prty Cust

Other

KEY DATES & INTERVALS

ARREST ▶ INDICTMENT X ▶ ARRAIGNMENT SENTENCE

U.S. Custody 9-13-76

Summons Served

First Appearance

In Charging District

Information 9-21-76

9-27-76 "

XX 12/6/76

3/25/77

5/5/77

5/5/77

MAGISTRATE

		DATE	INITIAL NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued		9-12-76	HB
COMPLAINT ▶		9-12-76	HB x
OFFENSE (In Complaint)	T. 49 USC Sections 1472 & 1473 - Aircraft piracy		

▶ 9-13-76

▶ 9-23-76 x

ASC 070B

DISMISSED

U.S. Attorney or Asst.

THomas Pattison

ATTORNEYS x

Martin Elefant, Esq.
16 Court St
Brooklyn, N. Y. 11241

* Show last names and suffix numbers of other defendants

Z.Busic-1, J.Busic-2, Pesut-4, Vlasic-5

DATE	DOCUMENT NO.
9-13-76	Defendant arraigned before Magistrate Chrein on a warrant issued by Judge Bramwell.
9-21-76	Indictment returned. Before Catoggio, Mag.
9-27-76	Before Bartels, J - case called - deft & counsel present- Interpreter sworn - deft arraigned and enters a plea of not guilty - adjd to Oct. 13 for status report.
10-13-76	Before Bartels, J - case called - deft & counsel present - adjd to Nov. 8, 1976 for Bail hearing: to 12-1-76 for pre trial motions and 12-6-76 for trial
10/18/76	Stenograhers transcript dated 10/13/76 filed.
10-21-76	Stenographer's Transcript dated 9-27-76 - Filed.
10-26-76	By BARTELS, J - Order filed that all bail and change of venue motions must be served and filed in this court on or before Oct. 27, 1976 at 12 Noon. U.S.Govt must file and serve any papers in opposition on or before Nov. 4, 1976 at 12 Noon. Hearing on the same will be held on Nov. 8, 1976 etc. (see order as indicated)
10-27-76	Order returned & Filed - Executed.

DATE	IV. PROCEEDINGS (continued) PAGE TWO	V. EXCLUDABLE DELAY
10-27-76	Notice of Motion for dismissal of the indictment - Filed.	
10-28-76	Before Bartels, J.- Case Called. Deft. & Counsel Present. Paul Bergman appointed as co-counsel for Deft.	
10-29-76	Notice of Motion for reduction of bail, pursuant to Rule 12 and Rule 46 returnable 11-8-76. - Filed.	
11-5-76	Letter filed dated Nov. 4, 1976 received from Chambers from AUSA Pattison for adjournment to Nov. 8, 1976	
11-5-76	Stenographer's Transcript dated October 28, 1976 - filed.	
11-8-76	Motion for Bill of Particulars - filed. (Forwarded to Chambers)	
11-8-76	Motion for Discovery and Inspection and all exculpatory Material.- filed. (forwarded to Chambers)	
11/9/76	Stenographers transcript dated 10/28/76 filed.	
11-9-76	Govts Brief filed in opposition to defts motion to dismiss counts 1 and 2 for improper venue	
11-10-76	~~Application in~~ Govts. Affidavit in support of application for bail reduction filed and Defts affidavit (Martin Elefant, Esq.) in support of application for bail reduction filed	
11-10-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Interpreter sworn. Motion for an order granting a change of venue argued. - decision reserved. Motion for a reduction of bail argued and denied.	
11-15-76	Affidavit of Thomas R. Pattison - filed.	
11-18-76	Notice of motion filed to suppress statements	
11-18-76	Stenographer's Transcript dated November 10, 1976 filed.	
11-19-76	By Bartels, J - Order filed that AUSA Pattison disclose to all defense counsel in this case any statements of defts in this case provided to any one deft under Rule 16.	
11-22-76	Government's response to deft. matanic's motion for discovery and inspection and bill of particular filed and forwarded to chambers.	
11-22-76	By BARTELS, J - Order filed denying defts motion for severance.	
1-22-76	By BARTELS, J - Order filed that counts 1 and 2 should be dismissed for lack of venue etc. Prior to the filing of the order dismissing counts 1 and 2 it is suggested that the Govt notify all defts that a prompt and speedy trial can still be had in the Eastern Dist. of NY on 12-6-76 as originally scheduled.	
11/23/76	Notice of Appeal filed.	
11/23/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.	

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
11-24-76	Motion for an order staying until 12-13-76 the order entered on Nov. 22, 1976 dismissing cts. 1 and 2- (recvd From Chambers)				
11-24-76	Before BARTELS, J - case called - defts & attys present - status report held and concluded - Order of 11-22-76 dismissing cts. 1 and 2 is stayed for 10 days until Dec. 3, 1976.				
11/24/76	By BARTELS, J. - Ordered that the order of 11/22/76 for dimissal of counts one and two of the indictment is stayed until 12/3/76.				
11-29-76	Order received from the Court of Appeals that the record be filed on or before December 22, 1976 filed.				
11-29-76	Stenographers transcript filed dated 11-24-76				
12-6-76	Notice of Motion and Affidavit filed for continuing the stay of the order dismissing counts 1 and 2 of the indictment, and staying the trial of count 3 of the indictment. (forwarded to Chambers)				
12-6-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Govt's. motion for a continuance of the stay of order of 11-22-76 until decision of court of appeals is rendered argued and granted. Deft's. motion for reduction of bail argued and denied.				
12-7-76	Stenographers transcript filed dated 12-6-76				
12-8-76	Voucher for Compensation for Expert Services filed.				
12-6-76	By Bartels, J - Order filed that the stay of the order dismissing counts 1 and 2 is extended pending determination of the appeal and that bail is contd and trial of ct.3 is stayed pending appeal.				
12-16-76	Affidavit of Service filed.				
12-16-76	Affidavit of Thomas R. Pattison filed with Court Exhibits one through four attached.				
12-16-76	Affidavit of Thomas R. Pattison filed.				
12-16-76	Letter written by AUSA Pattison to Judge Bartels to amend certain statements made during oral argument upon the pending venue motion in the case. - filed.				
12-16-76	Notice of Motion for an order pursuant to Rule 46 releasing the deft from custody pending appeal and trial, filed and forwarded to Chambers. (Returnable December 20, 1976 at 9:30 A.M.)				
12-20-76	Before BARTELS, J.-Case called-Deft and counsel present-Interpreter sworn-Deft's motion for reduction of bail. Motion argued-Motion denied-Deft's motion to Dismiss Argued-Motion denied-				
12-20-76	By Bartels, J.- Order filed that the motion to release the deft. from custody pending appeal and trial is under the circumstance denied.				

NITED STATES DISTRICT COURT
RIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
12/22/76	Court Exhibit A filed.				
2/22/76	Govts brief in opposition to defts motion for reduction of bail filed.				
12/22/76	Letter filed dated 10/18/76 from AUSA Pattison to set date for motions.				
12-22-76	Deft's. Notice of Appeal filed.				
12-22-76	Docket entries and duplicate of Notice of appeal mailed to the Court of Appeal.				
12-22-76	Record on Appeal certified and hand delivered to the Court of Appeal by Sara Schownwetter.				
12-22-76	By Bartels, J.- Order filed that the motion of the deft. for the appointment of an investigator under the Criminal Justice Act was, under the present circumstances, denied.				
2-27-76	Stenographer's Transcript dated December 20, 1976 filed.				
12-27-76	Acknowledgment received from the Court of Appeals for the Record on Appeal filed.				
(32)	[illegible]				
12-27-76	By Bartels, J Order filed ordering that the motion for order of release pursuant to T-18, U.S.C., Section 3164 is denied.				
1-3-77	Notice of Appeal for an order filed dated December 27, 1976 which order denied the deft's. motion for release from custody filed.				
1-3-77	Duplicate of Notice of Appeal and Docket entries mailed to the Cour of Appeals.				
1-10-77	Order received from the Court of Appeals that the record be docketed on or before January 10, 1977 filed.				
1-10-77	Supplemental record on Appeal certified and mailed to the Court of Appeals.				
1.28.77	Acknowledgment received from the Court of Appeals for the Supplemental Record on Appeal filed.				
1.31.77	Letter filed received from Chambers to Judge Bartels from Michael Asen that the case is on the calendar for status report on 2.2.77 at 3:00 P.M.				
2.2.77	Before Bartels, J.- Case Called. Deft. not present. Counsel present. Case adjd. to 2.24.77 for Motions. Case adjd. to 3.14.77 for Trial.				
2.3.77	Stenographer's Transcript dated February 2, 1977 filed.				
-15-77	Copy of letter filed dated 2-11-77 recvd from Chambers to Paul Bergman, Esq. indicating case will be on trial 3-14-77				
2/24/77	Govts memo in opposition to ddfts motion to suppress statements filed.				
	continued..........				
		Interval	Start Date	Ltr.	Total

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

PETER MATANIC

76 Yr. | 602 Docket No. | 3 Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
	(Document No.)				
2.24.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Deft's. motion for discovery and bill or particulars granted and denied as indicated on the record. Deft's. motion to dismiss count (1) on grounds that death penalty provision is unconstitutional. Motion aruged. Decision reserved. Case adjd. to 3.7.77 at 10:00 A.M. for motions on reciprical discovery, etc. Case adjd. to 3.14.77 at 10:00 A.M. for Suppression Hearing. Case adjd. to 3.22.77 for Trial.				
2-28-77	Stenographers transcript filed dated 2-24-77				
2.28.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for payment.				
3/1/77	By BARTELS, J.- Memo and order filed that the motion made by deft pursuant to Rule 16 (a)(1) (A) is denied.				
3-2-77	Order received from the court of appeals that Judge Bartels order of Dec 20, 1976 is affirmed. Petition for mandamus is denied.				
3-2-77	Copy of Opinion and Mandate filed received from the court of appeals that action is remanded to the District Court for further proceedings				
3-2-77 k	~~Deft~~ By BARTELS, J - Order filed that the deft remain at MCC his presence is required in the US District Court, ED NY and further ordered that no writ or order issued by a judge of any other jurisdiction shall be executed until the trial of this case is concluded.				
3.2.77	Letter filed dated 3.2.77 Setting date for Trial 3.14.77.				
3.2.77	By Bartels, J.- Order filed that the previous order entered on 3.2.77 be modified to permit the United States Marshal to transport the deft. to the New York State Supreme Court, N.Y. County on 3.2.77 for the purpose of appearing in a proceeding on a pending indictment before said court and further Ordered that the deft. shall remain in the continuous custody of the United States Marshal or his duly authorized edeputies and shall be returned to the M.C.C. after their appearance on 3.2.77 is concluded.				
3.4.77	Notice of Readiness for Trial filed.				
3.7.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				
3.7.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Motion by Peter Zimrath, Assistant District Attorney, N.Y. County to vacate order of 3.2.77 prohibiting U.S. Marshals from satisfying any writs of habeas corpus from any jurisdiction other than the Eastern District of New York argued and decision reserved. Case adjd. to 3.8.77 at 2:30 P.M.				
	over.......				
		Interval (per Section II)	Start Date End Date	Ltr. Code	To Days

AO 256A

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. E LUDABLE DELAY (a)	(b)	(c)	(d)
3.8.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Ordered that motion of Assistant District Attorney, New York County to vacate order dated 3.2.77 is denied. Motion to dismiss count one of the indictment on basis that Court lacks jurisdiction. Motion argued. Decision reserved. Case adjd. to 3.15.77 at 10:00 A.M. for Suppression Hearing.				
3-9-77	Stenographers transcript dated 3-7-77 filed				
3.10.77	Memorandum of Law concerning Venue as a Jury Issue filed and forwarded to Chambers.				
3.10/77	Letter filed to atty from B. Schulman re: dicovery materials.				
3-14-77	Transcript filed dated 3-8-77				
3/15/77	Voucher for compensation for expert services filed and forwarded to Washington for payment.				
3/15/77	Before BARTELS ,J .- Case called. Deft & Counsel present. Motion to suppress statement of deft made to F.B.I. Hearing ordered and begun. Hearing resumed on motion to suppress as to deft. Wade hearing ordered and begun. Hearing adjd to 3/16/77 at 10:00 a.m.				
3/16/77	Before BARTELS, J.- Case called. Deft & Counsel present. Suppression hearing resumed. Wade hearing resumed. Hearing adjd to 3/17/77 at 10:00 a.m.				
3-17-77	Before Bartels, J - case called - deft & counsel present - suppression hearing resumed - adjd to 3-22-77 for status report.				
3-22-77	By Bartels, J- Memorandum-Decision and Order filed denying suppression motion.				
3-22-77	By BARTELS, J - Memorandum-Decision and Order filed denying motion to dismiss count 1.				
3/22/77	Before BARTELS, J .- Case called. Deft & Counsel present. Motion to dismiss count 1 of the indictment on grounds that the grand jury was not properly instructed -denied. Hearing concluded. Motion denied. Status conference held and concluded. Case ajd to 3/23/77 for trial.				
3-23-77	4 transcripts filed dated Mar. 15, Mar. 16, Mar. 17 and March 22, 1977 respectively				
3.23.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Jury selection ordered and begun. Jury selection adjd. to 3.23.77.				
3/24/77	Before BARTELS, J._ Case called. Deft & Counsel present. Jury selection resumed. Case ajd to 3/28/77 at 10:00 for jury selection.				
3/28/77	Before BARTELS,J.- Case called. Deft & Counsel present. Jury selection resumed. Jurors selected and sworn. Peter Schlam opens for govt. Martin Elefant opens for deft. Case adjd to 3/29/77 at 10:00 a.m. for trial.				

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Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs PETER MATANTIC

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DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE (a)	(b)
3-29-77	Before Bartels, J - case called - deft & atty present - trial resumed - trial contd to 3-30-77.		
3-30-77	Voucher for expert services filed forwarded for payment		
3-30-77	Voucher for c ompensation for expert servicesfiled & forwarded for payment		
3/30/77	Before BARTELS, J.- Case called. Deft & Counsel present. Trial resumed. Case adjd to 3/31/77 at 10:00 a.m for trial.		
3.31.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.5.77 at 10:00 A.M. for Trial.		
4-4-77	Transcript filed ordered sealed by Bartels, J. dated 3-4-77		
4-5-77	Letter filed dated 4-4-77 from AUSA Korman forwarded to Chambers		
4-6-77	Defts requests to charge filed (retd to Chambers)		
4-6-77	4 letters filed received from Chambers (retd to Chambers) one dated Mar. 11 one dated Mar. 21 and 2 dated Mar 2, 1977.		
4-5-77	Before Bartels, J - case called - trial resumed - trial contd to 4-6-77		
4-6-77	Voucher for expert services filed forwarded for payment		
4-6-77	Transcript filed pgs 2277 to 2297 ~~fils~~ ordered sealed.		
4-6-77	Before Bartels, J - case called - trial resumed - trial contd to 4-7-77.		
4-7-77	Defts Memorandum of Law in support of defts motion for judgment of acquittal filed on count 1 pursuant to Rule 29(a) FRCr P		
4/8/77	Before BARTELS, J.- Case called. Deft & counsel present. Trial resumed. Govt rests. Defts motions for judgment of acquittal motion argued. Motion denied. Case adjd to 4/11/77 at 10:00 a.m. fortiral.		
4.11.77	Certified Copy of Order filed received from the Court of Appeals that the motion for leave to withdraw the appeal without prejudice is granted. (forwarded to Chambers.)		
4/11/77	Before BARTELS, J .- Case called. Deft & Counsel present. Trial resumed. Trial continued to 4/12/77 at 10:00 a.m.		
4-~~21~~ 12-77	Voucher for expert services filed forwarded for payment		
4-12-77	Before Bartels, J - case called - trial resumed - trial contd to 4-13-77		
4-13-77	Before Bartels, J - case called - trial resumed - trial contd to 4-14-77.		
4-14-77	Before Bartels, J - case called - trial resumed - trial contd to 4-18-77		
4-15-77	Supplemental record retd from the c of a -acknowledgment mailed to Clerk		

Interval | Start Date

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
4/18/77	Govts request to charge, and notice of motion for an order dismissing the gounds of gross prosecutorial misconduct etc, filed and forwarded to chambers.				
4.18.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial continued to 4.19.77 at 10:00 A.M.				gp
4/19/77	Voucher for compensation for expert services filed and forwarded to Washington for payment.	t.k.			
4,19.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.20.77 at 10:00 A.M. for Trial.				gp
4.20.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.21.77 at 10:00 A.M.				gp
4.21.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.25.77 at 10:00 A.M.				gp
4/25/77	Before Bartels, J-case called-defts & counsel present. Trial resumed-case adjd to 4/26/77.JLJ				
4.26.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.27.77 at 9:15 A.M. for Trial.				gp
4-27-77	Deft Busic/s Memorandum in support of Instructions No.s 37, 40, 41, 42, 43 & 66 filed.				
4-27-77	Letter filed dated 4-22-77 received from Chambers from AUSA Korman(retd to Chambers)				
4/27/77	BeforeBartels, J-case called-defts and counsel present trial resumed-govts rests-case adjd to 4/28/77 for trial.JLJ				
4.28.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft's. motion for Judgment of acquittal. Motion argued. Motion denied. Case adjd. to 5.2.77 at 10:00 A.M. for Trial.				gp
4.29.77	Voucher for Compensation for Expert Services filed and forwarded To Washington for Payment.				gp
5.2.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up. Order of sustenance signed. Deft's. motion for mistrial - motion denied. Order of Transportation signed. Deft. sums up. Case adjd. to 5.3.77 at 9:00 A.M. for Trial.				gp
5.3.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up on rebuttal. Order of sustenance signed. Judge charges Jury. Alternates discharged. Jury retires at 5:30 P.M. to deliberate. Order of sustenance signed. Jury returns at 7:35 P.M. to have testimoney read to them. Orders of Transportation signed. Order of Lodging signed. (2) Orders of sustenance signed. Jury retires for further deliberations. Case adjd. to 5.4.77 at 10:00 A.M. for Trial.				gp

continued.....

Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

MATANIC, Peter

Yr.	Docket No.	Def.
76	602	

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5.4.77.	By Bartels, J.- Order of Sustenance filed. (BREAKFAST)				gp
5.4.77	By Bartels, J.- Order of Sustenance filed. (DINNER)				gp
5.4.77	By Bartels, J.- Order of Transportation filed.				gp
5.4.77	By Bartels, J.- Order of Lodging filed.				gp
5.4.77	By Bartels , J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	Letter filed received from Chambers addressed to Judge Bartels from Pasquale D. Lotesta, M.D. In reference to Henry J. McGuinness' drowsiness during the daytime.				gp
5.4.77	By Bartels, J. - Order of Transportation filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5-4-77	Voucher for expert services filed and forwarded for payment (Court Reporter Henry Shapiro)				
5.4.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury deliberations continued. Jury returns to Courtroom at 10:25 A.M. to hear testimony Order of Sustenance signed. Jury retires at 11:05 A.M. to continue deliberation. Order of sustenance signed. Order of sustenance signed. Order of Transportation signed. Order of Lodging signed. Jury returns to Courtroom at 9:00 P.M. to hear testimony. Trial continued to 5.5.77 at 10:00 A.M. for Trial.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed.				gp
5.4.77	By Bartels, J.- Order of Lodging filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed. (LUNCH)				gp
5.4.77	By Bartels, J.- Order of Transportation filed.				g
5-5-77	Before BARTELS, J - case called - deft & counsel present - trial resumed -Jury deliberations resumed - Jury retires to continue deliberations - Jury returns with a verdict of not guilty on count 1 and guilty on counts 2 and 3. Jury discharged - trial concluded. Case adjd without date for sentence. rs				
5-5-77	3 orders of sustenance filed.				
5.9.77	Notice of Motion to maintain Deft. in Federal Custody filed and forwarded to Chambers.				gp
5.9.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment,				gp
5-9-77	2 transcripts filed ordered sealed by the court. (dated Mar. 23 and Mar. 24,1977)				
5.10.77	By Bartels, J.- Order filed that the Order of. 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.11.77 for 1 day for purpose of appearing in pre-trial proceedings & also ordered that deft. shall remain in continuous custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.11.77 is concluded.				gp
		Interval (per Section II)	Start Date End Date	Ltr. Code	Tot. Days

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5.10.77	By Bartels, J.- Amended Order filed that order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.12.77 for 1 day for purpose of appearing in pretrial proceedings & also ordered that deft. shall remain in custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.12.77 is concluded.				gp
5-11-77	2 transcripts filed , one dated May 4 and one dated May 5, 1977.				
5.19.77	Notice of Motion for an order pursuant to Rules 29, 33, and 34 granting a judgment of acquittal, granting a new trial returnable 5.23.77 at 4:30 P.M. filed and forwarded to Chambers.				gp
5/19/77	Notice of motion ret 5/23/77 for an order granting a judgment of acquittal as to Counts II and III of the indictment upon the grounds that the evidence was not sufficient as a matter of law to sustain conviction on those counts etc.jlj				
5-23-77	Before Bartels, J - case called - deft & counsel present - motion for judgment of acquittal and to set aside verdict - motion argued and motion denied - case adjd to July 20, 1977 at 9:30 am for sentence.				
5-25-77	Transcript filed dated May 23, 1977.				
6.1.77	Affidavit of Edward R. Korman filed received from Chambers.				gp
6.1.77	Affidavit of Barry E. Schulman filed received from Chambers.				gp
6.1.77	Deft's. supplemental requests to charge filed received from Chambers.				gp
6.1.77	Memorandum in Support of Motion by the District Attorney, New York County, to vacate the Court's Order of March 2nd, 1977 filed received from Chambers.				gp
6.1.77	Notice of Motion for an order precluding the government from using as evidence (1) the 2-page xerox document (2) the fingerprint testimony concerning that document etc filed received from Chambers.				gp
6.1.77	Proposed questions for the Jury Panel filed received from Chambers.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 5.1.77.				gp
6.1.77	Letter filed received from Chambers addressed to Daniel Fusaro from Paul B. Bergman dated 5.1.77. (COPY)				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B. Bergman dated 5.8.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael E. Tigar dated 5.10.77 with other material attached.				gp
6.1.77	Letter filed (COPY) received from Chambers addressed to Peter Schlam from Michael E. Tigar dated 2.16.77.				gp
6.1.77	Letter filed received from Chambers addressed to Michael E. Tigar from Peter R. Schlam dated 3.2.77.				gp

continued....

Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

MATANIC, Peter

76 Yr.	602 Docket No.	3 Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
6.1.77	Affidavit in Response to Deft. Busic's. Motion concerning Alleged improper use of the Grand Jury filed received from Chambers.				gp
6.1.77	Unsigned copy of Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.11.77 with other material attached.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartles from Edward R. Korman dated 4.22.77. Copy.				gp
6.1.77	Copy of Letter received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.22.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.29.77/				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Peter 1. Zimroth dated 5.9.77.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Martin Elefant and Paul B. Bergman dated 5.24.77.				gp
6.1.77	Voire Dire of Jury filed received from Chambers.				gp
6.3.77	By Bartels, J.- Order of Transportation filed.				gp
6.07.77	Stenographer's Transcript dated May 2nd, 1977 filed.				gp
6.07.77	Stenographer's Transcript dated April 21, 1977 filed.				gp
6.07.77	Stenographer's Transcript dated April 20th, 1977 filed.				gp
6.07.77	Stenographer's Transcript dated May 4th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 11th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 12th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 13th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 14th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 18th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 19th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 28th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 29th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 30th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 31st, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 5th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 6th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 7th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 25th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 26th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 27th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 28th, 1977 filed.				gp
6.15.77	Letter filed received from the Deft. addressed to Judge Bartels dated 6.14.77 informing the Court that he waives the time limit and request that sentencing in the case take place on 7.21.77.				gp
7-12-77	Notice filed setting date for sentence on 7-21-77.				
	kindly turn over.				
		Interval (per Section II)	Start Date End Date	Ltr. Code	To Da

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
7.21.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Deft. sentenced for a period of thirty (30) years imprisonment on Count two (2), for a period of five (5) years on Count three (3), both sentences to run concurrently.				
7.21.77	Judgment and Commitment filed. Certified Copies to Marshal and Probation.				gp
7.21.77	Notice of Appeal filed.				gp
7.21.77	Certified Copies of Docket entries, Duplicate copy of Notice of Appeal together with Form 'A' mailed to the Court of Appeals.				gp
7.28.77	Certified Copy of Judgment and Commitment returned and filed from Marshal. Deft. delivered on 9.13.76 to M.C.C., New York.				gp
7.28.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment. (V# 72169)				gp
7.28.77	Memorandum of Law on Behalf of the United States filed and received from Chambers.				gp
8/8/77	Scheduling order from C of A that the record be fild on or before 8/10/77 filed.jlj				
8-10-77	Record on appeal certified and handed to Elizabeth De Cristofaro, Sec. to Paul Bergman, for delivery to the court of appeals.				
8-15-77	Acknowledgment filed received from the court of appeals for receipt of record on appeal.				
		Interval	Start Date	Ltr.	Total

JUDGE/MAGISTRATE Assigned

U.S. vs PESUT, Frane

000036

BARTELS, J.

9 21 76 602 4

FELONY Fel x 207 District 1 Office Disp./Sentence 0711X

JUVENILE

76CR 602

5

U.S. MAG CASE NO ▸ 76 M 1822

OFFENSES CHARGED

U.S. TITLE/SECTION

U.S. TITLE/SECTION	OFFENSES CHARGED	
49:1472 & 18:2	Aircraft Piracy	2
	Conspiracy	1

CLOSED

☐ Denied AMT ☐ Fugitive

☐ Pers. Recog.

☐ PSA

$1,000.00 Conditions

Date

☐ 10% Deposit

X Surety Bond

☐ Collateral

☐ Other

II. KEY DATES & INTERVALS

ARREST or ▸ INDICTMENT X ▸ ARRAIGNMENT ▸ TRIAL ▸ SENTENCE

U.S. Custody Began 9-13-76

Summons Served

First Appearance

High Risk Case

Information 9-21-76

Indict. Waived

In Charging District

Superseding Indict./Info

9-27-76

12-6-76

3/29/77 ✓

5/5/77

✓

}On All Charges

}On Lesser Offense(s)

WOP ☐ WP

Government's Motion

MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued		9-12-76	HB
COMPLAINT ▸		9-12-76	HB
OFFENSE (In Complaint)		T. 49 USc Sections 1472 & 1473 Aircraft Piracy	

INITIAL APPEARANCE DATE ▸ 9-13-76

PRELIMINARY EXAMINATION OR REMOVAL HEARING ▸ 9-23-76

☐ WAIVED ☐ NOT WAIVED

X INTERVENING INDICTMENT

OUTCOME

☐ DISMISSED

X HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

ASC 070B

ATTORNEYS X

U.S. Attorney or Asst.

Thomas Pattison

*Irwin Rochman
230 Park Avenue
New York NY 10017
685-6488

Jospeh W. Ryan, Esq.
114 Old Country Road
Mineola, NY

* Show last names and suffix numbers of other defendants on same indictment/information

Z.Busic-1, J.Busic-2, Matanic-3, Vlasic-5.

EXCLUDABLE DELAY (a) (b) (c)

DATE	PROCEEDINGS
9-13-76	Defendant arraigned before Magistrate Chrein on warrant issued by Judge Bramwell - CJA Form #20 attached.
9-21-76	Indictment returned. Before CATOGGIO, Mag.
9-27-76	Before Bartels, J - case called - deft & counsel present - deft arraigned and enters a plea of not guilty - adjd to Oct. 13, 1976 for status report. Interpreter sworn.
10-13-76	Before Bartels, J - case called - deft & counsel present - adjd to 11-8-76 for bail hearing; adjd to 12-1-76 for pre trial motions and to 12-6-76 for trial
10/18/76	Stenographers transcript dated 10/13/76 filed.
10-21-76	Stenographer's Transcript dated 9-27-76 - Filed.
10-26-76	By BARTELS, J - Order filed that all bail/and change of venue motions must be served and filed in this court on or before 10-27-76 at 12 Noon. U.S.Govt. must file and serve any papers in opposition on or before 11-4-76 at 12 Noon. Hearing on the same will be held on Nov. 8, 1976 etc. (see order as indicated)

OPPOSITE THE APPLICABLE [illegible]

DATE	IV. PROCEEDINGS (continued) PAGE TWO	V. EXCLUDABLE DELAY Interval Section (a)	Start Date End Date (b)	Ltr. Code (c)	Total Days (d)
10-27-76	Order returned & Filed - Executed.				
10-27-76	Notice of Motion for dismissal of the indictment - Filed.				
10-28-76	Before Bartels, J.- Case Called. Deft. & Counsel Present. Petar Matanic sworn as interpreter. Jay Gold, Esq. to be substituted as counsel for Joseph Ryan. Mr. Gold to report on 11-3-76.				
11-3-76	Before BARTELS, J - case called - deft & counsel present - Interpreter Olga Rakijas sworn - Mr.Gold reports to the court that he will not be retained by the deft - Mr. W. Starasolsky to report on 11-4-76 if he will be retained as counsel for the deft.				
11-5-76	~~Rafx~~ Letter filed dated Nov. 4, 19[illegible] received from Chambers from AUSA Pattison for adjournment to No[illegible],1976				
11-5-76	Stenographer's Transcript dated October 28, 1976 - filed.				
11-5-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Interpreter sworn. Court appoints Allen Lashley as counsel for Deft. (Present.)				
11-8-76	Voucher for compensation - filed.				
11-8-76	Supporting affidavit of an application for the deponent to withdraw as appointed counsel - filed.				
11/8/76	Notice of appearance filed.*				
11/9/76	Stenographers transcript filed dated 10/28/76.				
11-9-76	Govts Brief filed in opposition to defts motion to dismiss counts 1 and 2 for improper venue				
11-10-76	Before Bartles, J.- Case Called. DEFT. & Counsel present. Interpreter sworn. Motion for an order granting a change of venue argued. - decision reserved. Motion for a reduction of bail argued and denied.				
11-15-76	Affidavit of Thomas R. Pattison - filed.				
11-18-76	Stenographer's Transcript dated November 10, 1976 filed.				
11-19-76	By Bartels, J - Order filed that Asst. U.S. Atty. Pattison disclose to all counsel any statements of defts in this case provided to any one deft under Rule 16 etc.				
~~11-19-76~~	~~By Bartels, J Order filed that Special agents of the F.B.I. obtain samples of hair~~				
11-22-76	Voucher for compensation of atty filed				
11-22-76	By BARTELS, J - Order filed denying motion for severance.				
11-22-76	By BARTELS, J - Order filed that counts 1 and 2 should be dismissed for lack of venue etc. Prior to the filing of the order dismissing counts 1 and 2 it is suggested that the Govt notify all defts that a prompt and speedy trial can still be had in the Eastern Dist of NY on 12-6-76 as originally scheduled.				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

602 PESUT, FRANE

76	602	4
Yr.	Docket No.	Def.

V. EXCLUDABLE DELAY (a) (b) (c) (d)

DATE	PROCEEDINGS (continued) (Document No.)
11/23/76	Notice of Appeal filed.
11/23/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A.
11-24-76	Motion for an order staying until Dec. 13, 1976 the order entered on 11-22-76 dismissing counts 1 and 2 - (recvd from Chambers)
11-24-76	Before BARTELS, J- case called - defts & attys present - status report held and concluded - Order of 11-22-76 dismissing cts. 1 and 2 is stayed for 10 days until 12-3-76
11/24/76	By BARTELS, J. - Ordered that the order of 11/22/76 for dismissal of counts one and two of the indictment is stayed until 12/3/76.
11-29-76	Order received from the Court of Appeals that the record be filed on or before December 22, 1976 filed.
11-29-76	Stenographers transcript filed dated 11-24-76
12-6-76	Notice of Motion and Affidavit filed for continuing the stay of the order dismissing counts 1 and 2 of the indictment, and staying the trial of count 3 of the indictment. (forwarded to Chambers)
12-6-76	Before Bartels, J.- Case Called. Deft. & Counsel present. Govt's. motion for a continuance of the stay of order of 11-22-76 until decision of court of appeals is rendered argued and granted. Deft's. motion for reduction of bail argued and denied.
12-7-76	Stenographers transcript filed dated 12-6-76
12-6- 76	By Bartels, J - Order filed that the stay of the order dismissing cts. 1 and 2 is extended pending appeal and that bail is contd and trial of ct.3 is stayed pending appeal.
12-16-76	Affidavit of Service filed.
12-16-76	Affidavit of Thomas R. Pattison filed with Court Exhibits one through four attached.
12-16-76	Affidavit of Thomas R. Pattison filed.
12-16-76	Letter written by AUSA Pattison to Judge Bartels to amend certain statements made during oral argument upon the pending venue motion in the case. - Filed.
12-20-76	Before BARTELS,J.-Case called-Deft and counsel present-Interpreter sworn-Deft's motion for reduction of bail Argued-Motion denied-
12-20-76	By Bartels, J.- Order filed that the motion to release the deft. from custody pending appeal and trial is under the circumstances denied.
12/22/76	Court exhibit A filed.
12/22/76	Letter filed dated 10/18/76 from AUSA Pattison so set dates for motions.
12/22/76	Govts brief in opposition to defts motion for reduction of bail file

Interval Start Date Ltr.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

V. EXCLUDABLE DELAY (a) (b) (c) (d)

DATE	PROCEEDINGS (continued) (Document No.)
12-22-76	Deft's. Notice of Appeal filed.
12-22-76	Docket entries and duplicate of Notice of appeal mailed to the Court of Appeal.
12-22-76	Record on Appeal certified and hand delivered to the Court of Appeal by Sara Schownwetter.
12-27-76	Stenographer's Transcript dated December 20, 1976 filed.
12-27-76	Acknowledgment received from the Court of Appeals for the Record on Appeal filed.
1-10-77	Supplemental record on appeal certified and mailed to the Court of Appeals.
1.28.77	Acknowledgment received from the Court of Appeals for the Supplemental Record on Appeal filed.
1.31.77	Letter filed received from Chambers to Judge Bartels from Michael Asen that the case is on the calendar for status report on 2.2.77 at 3:00 P.M.
2.2.77	Before Bartels, J.- Case Called. Deft. not present. Counsel present. Case adjd. to 2.24.77 for Motions. Case adjd. to 3.14.77 for Trial.
2.3.77	Stenographer's Transcript dated February 2, 1977 filed.
2-15-77	Copy of letter filed dated 2-11-77 recvd from Chambers to Paul Bergman, Esq. stating case will be on trial March 14, 1977.
2.24.77	Notice of Motion to Suppress Statements pursuant to Rules 5 and 12 F.R.C.P. filed and forwarded to Chambers.
2.24.77	Notice of Motion to Suppress Evidence pursuant to Rule 41, F.R.C.P. filed and forwarded to Chambers.
2/24/77	Govts mem in opposition to defts motion to suppress statments filed.
2.24.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Deft's. motion for discovery and bill of particulars granted and denied as indicated on the record. Deft's. motion to dismiss count (1) on grounds that death penalty provision is unconstitutional. Motion argued. Decision reserved. Case adjd. to 3.7.77 at 10:00 A.M. for motions on reciprical discovery, etc. Case adjd. to 3.14.77 at 10:00 A.M. for Suppression Hearing. Case adjd. to 3.22.77 for Trial.
2-28-77	Stenographers transcript filed dated 2-24-77
3/1/77	By BARTELS, J. - Memo and order filed that the motin made by deft pursuant to Rule 16 (a)(1)(A) is denied.
3-2-77	Order received from the court of appeals that Judge Bartels Order of Dec. 20, 1976 is affirmed. Petition for mandamus is denied.
3-2-77	Mandate and copy of Opinion filed received from the court of appeals that action is remanded for further proceedings ect.
3-2-77	By BARTELS, J - Order filed that deft shall remain at MCC unless presence is required in the US District Court, EDNY and further Ordered that no writ or order issued by a judge of any other jurisdiction shall be executed until the trial of this case is concluded.

continued......

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Interval Start Date Ltr. Total

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

PESUT, FRANE

76 Yr. | 602 Docket No. | 4 Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
3.2.77	Letter filed dated 3.2.77 Setting Case for Trial 3.14.77.				
3.2.77	By Bartels, J.- Order filed that the previous order entered on 3.2.77 be modified to permit the United States Marshal to transport the deft. to the New York State Supreme Court, N.Y. County on 3.2.77 for the purpose of appearing in a proceeding on a pending indictment before said court and further Ordered that the deft. shall remain in the continuous custody of the United States Marshal or his duly authorized edeputies and shall be returned to the M.C.C. after their appearance on 3.2.77 is concluded.				
3.4.77	Notice of Readiness for Trial filed.				
3.7.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				
3.7.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Motion by Peter Zimrath, Assistant District Attorney, N.Y. County to vacate order of 3.2.77 prohibiting U.S. Marshals from satisfying any writs of habeas corpus from any jurisdiction other than the Eastern District of New York argued and decision reserved. Case adjd. to 3.8.77 at 2:30 P.M.				
3.8.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Ordered that motion of Assistant District Attorney, New York County to vacate order dated 3.2.77 on basis that Court lacks jurisdiction. Motion argued. Decision reserved. Case adjd. to 3.15.77 at 10:00 A.M. for Suppression Hearing.				
3-9-77	Stenographers transcript dated 3-7-77 filed.				
3.10.77	Memorandum of Law concerning Venue as a Jury issue filed and forwarded to Chambers.				
3/10/77	Leeter filed to atty from B. Schulman dtd 3/10/77 , re: disoovery materials.				
3-14-77	Transcript filed dated 3-8-77				
3/15/77	Before BARTELS, J.- Case called. Deft & Counsel present. Interpreter Boris Maruna sworn for deft. Hearing ordered and begun. Wade hearing ordered and begun. Hearing adjd to 3/16/77 at 10:00 a.m.				
3/16/77	Before BARTELS, J. - Case called. Deft & Counsel present. Suppression hearings resumed. Wade hearing resumed. Interpreter Boris Maruna sworn for deft. Hearing adjd to 3/17/77 at 10:00 a.m.				
3-17-77	Before Bartels, J - case called - deft & atty present - Interpreter present and Sworn - suppression hearing resumed - adjd to 3-22-77 for status report.				

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Interval (per Section II) | Start Date / End Date | Ltr. Code | Tot. Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

V. EXCLUDABLE DELAY

DATE	PROCEEDINGS (continued) (Document No.)	(a)	(b)	(c)	(d)
3-22-77	By BARTELS, J- Memorandum-Decision and Order filed denying suppression motion.				
3-22-77	By BARTELS, J - Memorandum -Decision and Order filed denying motion to dismiss count 1.				
3/22/77	Before BARTELS,J.= Case called. Deft & Counsel present. Motion to dismiss count 1 of the indictment on grounds that the grand jury was not properly instructed denied. Hearing concludd. Motion denied. Status conference held and concluded. Case adjd to 3/23/77 for trial.				
3-23-77	4 transcripts filed dated Mar. 15, Mar. 16, Mar 17 and Mar. 22, 1977 , respectively.				
3.23.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Jury selection ordered and begun. Jury selection adjd. to 3.23.77..				
3/24/77	Before BARTELS, J.- case called. Deft &Counsel present. Jury selection resumed. Case adjd to 3/28/77 at 10:00 a.m. for jury selection.				
3/28/77	Before BARTELS, J.- Case called. Deft & Counel present. Jury selection resumed. Jurors selected and sworn Peter Schlam opens for govt.Irwin Rochman opens fordeft. Case continued to 3/29/77 at 10:00 a.m. for trial.				
3-29-77	Before Bartels, J - case called - deft & atty present - trial resumed - trial contd to 3-30-77. Interpreter B. Maruna present for deft Pesut.				
3/30/77	Before BARTELS,J - Case called. Deft & Counsel present. Trial resumed. Case adjd to 3/31/77 at 10:00 a.m. for trial.				
3.31.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.5.77 at 10:00 A.M. for Trial.				
4-4-77	Transcript filed ordered sealed by Bartels J. dated ~~xx~~ 3-4-77				
4-5-77	Letter filed dated 4-4-77 from AUSA Edward Korman forwarded to Chambers				
4-5-77	Before Bartels, J - case called - deft & counsel present - trial resumed - trial contd to 4-6-77. Interpreter B.Maruna present.				
4-6-77	Four letters filed received from Chambers and retd (2 dated Mar. 2, one dated Mar 11 and one dated March 21, 1977)				
4-6-77	Voucher for compensation filed forwarded for payment (for expert services)				
4-6-77	Before Bartels, J - case called - trial resumed - Interpreter BMaruna present - trial contd to 4-7-77				
4-6-77	Transcript filed pages 2277 to 2297 ordered sealed by Judge Bartels				
4/8/77	Before: BARTELS,J.- Case called. Deft &Counsel present. Trial resumed. Govt rests. Defts motion for judgment of acquittal motion argued. Motion denied. Case adjd to 4/11/77 at 10:00 a.m. for trial.				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs PESUT, FRANE

76 602 4
Yr. | Docket No. | Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELA (a)	(b)	(c)	(d)
4/11/77	Before BARTELS,J. - Case called. Defts and counsel present. Trial resumed. Trial continued to 4/12/77 at 10:00 a.m.				
4-12-77	Before Bartels, J - case called - trial resumed - trial contd to 4-13-77				
4-13-77	Before Bartels, J - case called - trial resumed - Interpreter present - trial contd to 4-14-77				
4-15-77	Supplemental record received from the court of appeals- acknowledgment mailed to Clerk.				
4-14-77	Before Bartels, J - case called - trial resumed - trial contd to 4-18-77				
4/18/77	Govts request to charge, and notice of motion for an order dismissing the gounds of gross prosecutorial mis - conduct etc, filed and forwarded to chambers.				
4/18/77	Voucher for compensation for appointment of counsel received from the C of A approved and filed; forwarded to washington for payment.				
4.18.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial continued to 4.19.77 at 10:00 A.M.				gp
4.19.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Case adjd. to 4.20.77 at 10:00 A.M. for Trial.				gp
4.20.77	Copy of Letter filed addressed to Judge Bartels from Edward R. Korman expressing his objection to the so-called eyewitness identification 'expert' which the deft. has indicated he intends to call. (together with copy of Counter-Request to charge on the issue of eyewitness identification.- Filed)				gp
4.20.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial adjd. to 4.21.77 at 10:00 A.M.				g
4.21.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft's. motion for a mistrial - Motion denied. Deft. rests. Trial adjd. to 4.25.77 at 10:00 A.M.				g
4/25/77	Before Bartels, J-case called-defts & counsel present. Interpreters Boris Mavina sworn on behalf of deft Pesut. Trial resumed-case adjd to 4/25/77.JLJ				
4.26.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Identification hearing ordered and begun Hearing concluded. Identification of Deft. admitted.				
4-27-77	Deft Zvonco Busic's Memorandum in support of Instructions Nos. 37, 40, 41, 42, 43 & 66 filed.				
4/27/77	BBfore Bartels, J-case called-defts and counsel present trial resumed-govt rests-case adjd to 4/28/77 for trial.JLJ				

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Interval | Start Date / End Date | Ltr. Code | Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

Frane Pesut

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
4.28.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft rests. Deft's. motion for Judgment of acquittal. Motion argued. Motion denied. Case adjd. to 5.2.77 at 10:00 A.M. for Trial.				gp
5.2.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up. Order of sustenance signed. Deft's. motion for mistrial - motion denied. Order of Transportation signed. Deft. sums up. Case adjd. to 5.3.77 at 9:00 A.M. for Trial.				gp
5.3.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. sums up on rebuttal. Order of sustenance signed. Judge charges Jury. Alternates discharged. Jury retires at 5:30 P.M. to deliberate. Order of sustenance signed. Jury returns at 7:35 P.M. to have testimony read to them. Orders of Transportation signed. Order of Lodging signed. (2) Orders of sustenance signed. Jury retires for further deliberations. Case adjd. to 5.4.77 at 10:00 A.M. for Trial.				gp
5.4.77	Before Bartels, J.- Case Called. Hearing in the matter of Henry McGuinness held. Contempt proceedings dismissed.				gp
5.4.77	By Bartels, J.- Order of Sustenance filed. (BREAKFAST)				gp
5.4.77	By Bartels, J.- Order of Sustenance filed. (DINNER)				gp
5.4.77	By Bartels, J.- Order of Transportation filed.				g
5.4.77	By Bartels, J.- Order of Lodging filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	Letter filed received from Chambers addressed to Judge Bartels from Pasquale D. Lotesta, M.D. in reference to Henry J. McGuinness' drowsiness during the daytime.				g
5.4.77	By Bartels, J.- Order of Transportation filed.				g
5.4.77	By Bartels, J.-Order of Sustenance filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury deliberations continued. Jury returns to Courtroom at 10:25 A.M. to hear testimony Order of Sustenance signed. Jury retires at 11:05 A.M. to continue deliberation. Order of sustenance signed. Order of Sustenance signed. Order of Transportation signed. Order of Lodging signed. Jury returns to Courtroom at 9:00 P.M. to hear testimony.. Trial continued to 5.5.77 at 10:00 A.M. for Trial.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	By Bartels, J.- Order of Lodging filed.				g
5.4.77	By Bartels, J.- Order of Sustenance filed.				g
5.4.77	By Bartels, J.- Order Sustenance filed. (LUNCH)				g
5.4.77	By Bartels, J.- Order of Transportation filed.				g
5-5-77	Before BARTELS, J - case called - trial resumed - Interpreter Boris Maruna sworn on behalf of deft. Jury deliberations resumed - Jury returns with a verdict of not guilty on count 1 and guilty on counts 2 and 3 - trial concluded - Jury discharged - adjd without date for sentence.				
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

PESUT, Frane

76 Yr. | 602 Docket No. | 4 Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5.9.77	Notice of Motion to maintain Deft. in Federal Custody filed and forwarded to Chambers.				gp
5.9.77	Voucher for Compensation for Expert Services filed and forwarded to Washington for Payment.				gp
5-9-77	2 Transcripts filed ordered sealed by the court. (dated Mar. 23 and Mar. 24, 1977)				
5.10.77	By Bartels, J. Order filed that the Order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.11.77 for 1 day for purpose of appearing in pre-trial proceedings & also ordered that deft. shall remain in continuous custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.11.77 is concluded.				gp
5.10.77	By Bartels, J.- amended Order filed that thh Order of 3.7.77 shall remain in full force and effect, except that the U.S. Marshal may transport the deft. to N.Y. State Supreme Court, 5.12.77 for 1 day for purpose of appearing in pretrial proceedings & also Ordered that deft. shall remain in custody of the U.S. Marshal and shall be returned to the M.C.C., after appearance on 5.12.77 in concluded.				gp
5-11-77	2 transcripts filed , one dated May 4 and one dated May 5, 1977.				
5.19.77	Notice of Motion for an order pursuant to Rules 29, 33, and 34 granting a judgment of acquittal, granting a new trial returnable -.23.77 at 4:30 P.M. filed and forwarded to Chambers.				gp
5-23-77	Before Bartels, J - case called - deft & counsel present - deft motion to set aside the verdict and for a judgment of acquittal - motion argued and motions denied - case adjd to July 20, 1977 at 9:30 am for sentence.				
5-25-77	Transcript filed dated May 23, 1977/				
6.1.77	Affidavit of Edward R. Korman filed received from Chambes.				gp
6.1.77	Affidavit of Barry E. Schulman filed received from Chambers.				gp
6.1.77	Deft's. supplemental requests to Charge filed received from Chambers.				gp
6.1.77	Memorandum in Support of Motion by the District Attorney, New York County, to vacate the Court's Order of March 2nd, 1977 filed received from Chambers.				gp
6.1.77	Notice of Motion for an order precluding the government from using as evidence (1) the 2-page xerox document (2) the fingerprint testimony concerning that document etc filed received from Chambers.				gp
6.1.77	Deft's. Memorandum in Support of the Admissibility of the Expert Testimoney of Dr. Robert Buckhout on the factors which may affect the reliability of eye-witness identifications filed received from Chambers.				gp

continued.....

Interval | Start Date / End Date | Ltr. Code | Total Days

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

PESUT, Frane

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
6.1.77	Proposed questions for the Jury Panel filed received from Chambers.				gp
6.1.77	Voir Dire Questions submitted on Behalf of Deft. filed received from Chambers.				gp
6.1.77	Voir Dire Questions to be asked by Counsel on behalf of the deft. filed received from Chambers.				gp
6.1.77	Deft's. Second Supplemental requests to Charge filed received from Chambers.				gp
6.1.77	Deft's. requests to Charge filed received from Chambers.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Paul B.Bergman dated 5.8.77/				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Michael E. Tigar dated 5.19.77 with other material attached.				gp
6.1.77	Letter filed (COPY) received from Chambers addressed to Peter Schlam from Michael E. Tigar dated 2.16.77.				gp
6.1.77	Letter filed received from Chambers addressed to Michael E. Tigar from Peter R. Schlam dated 3.2.77				gp
6.1.77	Affidavit in Response to Deft. Busic's. Motion concerning Alleged improper use of the Grand Jury filed received from Chambers.				gp
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.19.77. (COPY)				g
6.1.77	Unsigned copy of Letter filed received from Chambers. addressed to Judge Bartels from Edward R. Korman dated 4.11.77 with other material attached.				g
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.19.77.				g
6.1.77	Counter-Request to Charge on the Issue of Eyewitness identification filed received from Chambers.				g
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Edward R. Korman dated 4.29.77.				g
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Peter L. Zimroth dated 5.9.77.				g
6.1.77	Letter filed received from Chambers addressed to Judge Bartels from Martin Elefant and Paul B. Bergman dated 5.24.77.				g
6.3.77	By Bartles, J.- Order of Transportation filed.				g
6.07.77	Stenographer's Transcript dated May 2nd, 1977 filed.				g
6.07.77	Stenographer's Transcript dated April 21, 1977 filed.				g
6.07.77	Stenographer's Transcript dated April 20th, 1977 filed.				g
6.07.77	Stenographer's Transcript dated May 4th, 1977 filed.				g
6.10.77	Stenographer's Transcript dated April 11th, 1977 filed.				g
6.10.77	Stenographer's Transcript dated April 12th, 1977 filed.				g
6.10.77	Stenographer's Transcript dated April 13th, 1977 filed.				g
6.10.77	Stenographer's Transcript dated April 14th, 1977 filed.				g
6.10.77	Stenographer's Transcript dated April 18th, 1977 filed.				g
6.10.77	Stenographer's Transcript dated April 19th, 1977 filed.				g

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	Interval (per Section II)	Start Date End Date	Ltr. Code	To

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

PESUT, Frane

Yr.	Docket No.	Def.
76	602	4

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
6.10.77	Stenographer's Transcript dated March 28th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 29th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 30th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated March 31st, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 5th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 6th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 7th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 25th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 26th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 27th, 1977 filed.				gp
6.10.77	Stenographer's Transcript dated April 28th, 1977 filed.				gp
7-12-77	Notice filed setting case for sentence on July 21, 1977.				
7.21.77	Before Bartels, J.- Case Called. Deft. & Counsel present. Interpreter sworn. Defendant sentenced for a period of thirty (30) years imprisonment on Count two (2), for a period of five (5) years on Count three (3), both sentences to run concurrently.				gp
7.21.77	Judgment and Commitment filed. Certified Copies to Marshal and Probation.				gp
7.21.77	Notice of Appeal filed.				
7.21.77	Certified copies of Docket entries, Duplicate copy of Notice of Appeal together with Form 'A' mailed to the Court of Appeals.				gp
7-27-77	Judgment & commitment retd and filed - deft. del to Warden, MCC , NY.				
7.28.77	Voucher for Compensation for Expert Services filed and was forwarded to Washington for Payment (V# 72159)				gp
7.28.77	Memorandum of Law on Behalf of the United States filed received from Chambers.				gp
8/8/77	Scheduling order from C of A that the record be filed on or before 8/10/77.jlj				
8-10-77	Record on appeal certified and handed to Elizabeth De Cristofaro, Sec. to Paul Bergman, for delivery to the court of appeals.				
8-15-77	Acknowledgment filed received from the court of appeals for receipt of record on appeal.				

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Interval per Section 3161	Start Date End Date	Ltr. Code	Total Days

FD-302 (REV. 11-27-70)

FEDERAL BUREAU OF INVESTIGATI(

1

Date of transcription 9/20/76

FRANE PESUT was placed under arrest aboard the French military aircraft which transported him from Paris to John F. Kennedy (JFK) International Airport.

Upon being placed in a Bureau automobile for transportation to Federal Bureau of Investigation (FBI) Headquarters in Manhattan, he was advised of his rights as contained in FD-395, by Special Agent (SA) JOHN E. WESTHOFF. PESUT stated that while his knowledge of the English language is limited he understood his rights as read to him by SA WESTHOFF. No attempt was made to interview PESUT during the time he was being transported from JFK International Airport to FBI Headquarters.

Interviewed on 9/12/76 at Queens, New York File # NY 164-1268

by SAs PAUL E. MARUM, JOHN E. WESTHOFF, and HORST DREWNIOK/PEN/mk Date dictated 9/15/76

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FD-302 (REV. 11-27-70)

FEDERAL BUREAU OF INVESTIGATION

1

Date of transcription 9/14/76

FRANK PESUT was interviewed at the New York Office (NYO) of the Federal Bureau of Investigation (FBI). PESUT stated that his knowledge of the English language was limited and the interview was therefore conducted by Special Agent (SA) JOHN C. DERDAK in the Croatian language. At the outset of the interview SA DERDAK translated into the Croatian language the items contained in FD-395, "Advice of Rights" form. PESUT stated that he understood his rights as explained to him and proceeded to execute the waiver of rights portion of the FD-395.

PESUT then furnished the following information:

On Wednesday afternoon, September 8, 1976, he received a telephone call at his place of employment, A.G. Industries, 2734 East Tremont Avenue, Bronx, New York (NY), from ZVONKO BUSIC, a Croatian friend of his who he has known for approximately one year. BUSIC told him that there was going to be a hijacking and that they were planning to throw leaflets expounding the Croatian cause from the hijacked airplane. PESUT was instructed to go to the Trans World Airlines (TWA) terminal at La Guardia Airport on Friday at 6:00 PM. He was told that other individuals besides himself and BUSIC would be involved in the hijacking, but he was furnished no additional names.

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PESUT did not go to work on Thursday or Friday as he wanted to spend the time making preparations for the hijacking. He told his landlord, whose name he does not know, that he was planning to move to the Bronx at the end of the month in order to be closer to his place of employment. He packed a suitcase with two jackets, two pairs of trousers and one shirt. On Friday afternoon, some time between 3:30 and 4:00 PM, he made a telephone call from a pay telephone located near his home in Fairview, New Jersey (NJ), to a cab company in Fort Lee, NJ, the name of which he obtained from the telephone book. The cab came to his residence approximately fifteen minutes later. He did not recall the name on the cab, but it was driven by a white male, middle-aged, and the cab was yellow in color. He instructed the driver that he wanted to go to La Guardia Airport and the driver, using his radio,

Interviewed on 9/12/76 at New York, New York File # NY 164-1268

by SAs PAUL E. MARUM, JOHN C. DERDAK, [illegible] [illegible] and Detective BILL LINCHER (NYCPD)/PEM/mk Date dictated 9/14/76

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

contacted his dispatcher and determined that the fare for the trip would be $18.50. Upon their arrival at LaGuardia he instructed the driver to take him to the TWA terminal. He gave the driver a twenty dollar bill and a five dollar bill in payment for the trip and instructed the driver to keep the change.

He went into the TWA terminal where he met BUSIC, who was alone in the terminal. BUSIC gave him a number of packets of leaflets which were to be used during the hijacking. PESUT put four of the packets of leaflets in an attache case which he brought with him, and put eight or nine other packets into his suitcase. Each of the packets contained approximately 500 leaflets. He went to the baggage counter and checked in his suitcase. In the waiting room he saw ZVONKO BUSIC's wife, (First Name Unknown) (FNU) MATANIC and (FNU) VLASIC, who he recognized as fellow Croatians who attended the Croatian Roman Catholic church on 50th Street and 11th Avenue, New York City (NYC). These people were standing separately in the terminal, although Mrs. BUSIC later joined her husband. He did not talk to any of these individuals.

In addition to the pamphlets, BUSIC had given him an airline ticket in the name of HOSS, Mr. T., for passage on Flight 355 to Chicago. He went to the check-in desk and requested a window seat in the smoking section and was assigned seat 22F. He boarded the airplane and took his seat on the righthand side of the airplane and observed ZVONKO BUSIC seated on the left side of the airplane two or three rows in front of him. BUSIC was sitting with his wife. Two middle-aged women were seated next to PESUT in his row of three seats.

MATANIC was seated on the righthand side of the airplane six or seven rows in front of PESUT by a window, and VLASIC was seated about three rows in front of PESUT in an aisle seat. After the airplane took off and was air-borne for about twenty minutes BUSIC got up from his seat and walked down the aisle to the rear of the airplane. He returned back up the aisle and stopped to talk to one of the stewardesses who was distributing drinks. BUSIC then continued towards the front of the airplane where the cockpit is located. VLASIC got up and went to the rear of the airplane. VLASIC was carrying a black bag and was stopped by one of the stewardesses and told not to carry the bag to the men's room, where he said he was going. VLASIC returned to his seat with the bag and then came back down the aisle, but had the bag with him once again.

At this time Mrs. BUSIC got up and walked back and forth from the front to the rear of the aisle several times. She then stopped at PESUT's seat and told him to get up and go to the rear of the airplane. He left his seat and went to the rear of the airplane, taking a vacant seat in the rear where he was seated in an aisle seat next to two young men. Mrs. BUSIC told him that VLASIC was going to bring something back to him. VLASIC came down the aisle and went into the men's room. He came out of the men's room a short time later and held in his hand a metal pot with a cover on it and a wooden handle. This pot had batteries of the type used in transistor radios taped to it and there were also wires and an electrical switch. VLASIC told PESUT in Croatian that it was not a real bomb, but told him that the electrical switch was a triggering device.

PESUT then heard an announcement in English over the loudspeaker, which he presumed was from the Captain, which stated that the airplane had been taken over and that the passengers should not be frightened. PESUT got up from his seat and stood in the back of the airplane and held the device, which had been given to him by VLASIC, in his hand. The Captain informed the passengers that he was changing the course of the airplane from Chicago to Montreal. At some point later in the flight PESUT was informed by BUSIC that they were going to fly to Yugoslavia to distribute the pamphlets. The airplane flew to Montreal to get fuel and then to Gander, Newfoundland, where they were joined by a second TWA airplane and about 35 of the passengers were allowed to leave. The second airplane was necessary because it was not possible to throw the leaflets from the airplane in which they were riding. PESUT was unaware of what method was used to determine which passengers would leave the airplane as he was not consulted by BUSIC concerning this. They then flew to Iceland and then flew over London where a second airplane threw out the leaflets. The airplane then landed in Paris, where the French authorities informed them that the airplane was not leaving Paris under any circumstances. BUSIC handled all the negotiations with the French authorities and PESUT had no idea what they discussed, but was later informed that they were surrendering to the French authorities. While in the custody of the French police and leaving the airport in Paris, he was told that an explosion took place in New York in connection with the hijacking and three New York City Police officers had been killed.

PESUT insisted he knew nothing about a bomb being placed in Grand Central Station, NY, and he would not have taken part in the hijacking operation if he had any idea that anyone would be killed in the course of the hijacking.

The following description of PESUT was obtained through interview and observation:

Name:	FRANE PESUT
Knickname:	Franjo
Race:	White
Sex:	Male

Date of Birth (DOB:	October 11, 1950
Place of Birth (POB):	Benkoc, Croatia, Yugoslavia
Residence:	261 Walker Street Fairview, NJ (One year and three months)
Height:	Five feet seven inches tall
Weight:	165 pounds
Hair:	Brown, worn long
Eyes:	Brown
Scars:	One-inch scar under side of chin
Tattoos:	None
Maritial Status:	Single
Father:	TOMA PESUT Lisicic, Croatia, Yugoslavia
Mother:	MASA PESUT Lisicic, Croatia, Yugoslavia
Brother:	SIME PESUT Lisicic, Croatia, Yugoslavia
Brother:	IVAN PESUT Sydney, Australia
Brother:	JOSIP PESUT Sydney, Australia
Sister:	Mrs. MIKLI ERCEG Cleveland, Ohio

Employment:	A.G. Industries 2734 East Tremont Avenue Bronx, NY
Occupation:	Machine Operator
Period of Employment:	One year
Former Employment:	U.S. Steel Company Cleveland, Ohio (Machine Operator)
Former Address:	1100 64th Street Cleveland, Ohio (Three and one-half years)
Date of Entry into U.S.:	1972 at New York
Date left Yugoslavia:	1971 (Entered Austria with a tourist passport)
Present Immigration Status:	Resident alien
Military Service:	Yugoslavian Army
Dates of Service:	February 28, 1969 to May, 1970
Military Rank:	Private
Type of Discharge:	Honorable
Military Occupation Specialty:	Telephone Lineman, Signal Corps

NY
7

Education:	High School graduate, Yugoslavia
Years of Education:	Eight
Technical Education:	Driver's Training School (Name not recalled) Cherry Hill, NJ
Former Occupation in Yugoslavia:	Stone Mason, brick layer
Arrest Record:	Possession of an unregistered gun in Cleveland, Ohio

FD-26 (Rev. 9-11-62)

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9/12/76
(Date)

201 East 69 St NY NY
(Location)

I, Julienne Busić, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize any agent of the, ~~and~~ , ~~Special Agents~~ ~~of the~~ Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of ~~my premises~~ luggage JB located at

These agents are authorized by me to take from my ~~premises~~ luggage JB any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above-named Special Agents voluntarily and without threats or promises of any kind.

(SIGNED)

Julienne Busic

WITNESSES:

Margot Dennedy FBI NY 9/12/76

[illegible] Foley, Jr. FBI NYC 9/12/76

Form [illegible] SM/
70[illegible] 346

Statement of:m Zvonko Busic

Made to: Robert Tanenbaum, A.D.A.

Stenographer: Leo Cosentino

Present: Robert Gottlieb, A.D.A.
Detective James P. Mohan
Detective Neil McInnes
Arson Explosion Squad
Mark Landsman, Esq.

Date: September 14, 1976 Evening hours

Place: Manhattan Federal Correctional Facility

BY MR. TANENBAUM:

Q Mr. Busic, I spoke with you on Sunday evening, you recall that?

A Yes.

Q Again, I want to introduce myself and advise you of your rights and introduce everybody else who is in the room with you before I ask you any questions. Just so it is clear on the record, Mr. Mark Landsman is here and he is your attorney, right?

A Yes.

Q And have you discussed with him this evening before I and the other detectives and Assistant District Attorney Gottlieb and Mr. Cosentino, who is the stenographer entered this room, did you discuss with him the fact that I came here to ask you some questions?

A Yes, I did.

Q And you have consented to speak with me; is that correct?

A Yes.

Q Now, again my name is Bob Tanenbaum, I'm an Assistant District Attorney in New York County. I'd like to ask you some questions about the hijacking of that T.W.A plane as well as the bomb blast that occurred to Police Officers Brian Murray as well as the injuries to the other three Officers, namely: Sgt. Terrence McTigue, and Police Officers Henry Dworkin and Deputy Inspector Fritz Behr. Inside the room here seated next to your lawyer Mr. Landsman is Mr. Cosentino, a stenographer who works for the District Attorney's Office and he is taking down everything that is being said in this room. Do you see that?

A Yes, I do.

Q And also seated with me are two detectives. Detective Neil McInnes, who is with the Arson Explosion Squad and Mr. James Mohan, Arson Explosion Squad and also Mr. Gottlieb, and Assistant District Attorney and he was with me on Sunday when I spoke to you on Sunday, you recall that?

A Him?

Q Yes?

A I don't remember seeing him, was he there?

Q Yes, he was.

A Well, sorry, I don't remember you.

Q Now, again, before going any further, I want to warn you of your rights again in this matter, You have the right to remain silent and to refuse to answer any questions. Do you understand Mr. Busic?

A Yes, I do.

Q Anything you say can be used against you in court. Do you understand that?

A Yes, I do.

Q You have the right to consult a lawyer now before any questioning and have a lawyer present during any questioning. Do you understand that?

A Yes, I do.

Q And indeed you have your lawyer Mr. Landsman seated next to you, correct?

A Yes, It is.

Q If you have no lawyer or cannot afford a lawyer, a lawyer will be provided for you free of charge before any questioning. Do you understand sir?

A Yes.

Q Having been advised of your rights, are you willing to tell me what happened in regard to the hijacking and bombing blast death to Police Officer Brian Murray with your lawyer being present, you're willing to talk to us?

A Yes, I am.

Q Now, I also should inform you that five arrest warrants, and I said five arrest warrants, have been issued by a court in New York County for your arrest and have been lodged here, and the charge for the arrest warrants is homicide. Do you understand that?

A Five arrest warrants?

Q Arrest warrants. There have been five arrest warrants that have been issued by a Judge from the Criminal Court by Leon Becker. He signed those warrants yesterday and the warrants charge you and four other defendants, that is the four other people that were with you on the plane, namely; Julienne Busic, Mark Vlasic, and Petar Matavic and Frane Pesut with Homicide in New York County. That is the homicide of Police Officer Brian Murray.

A Yes, I do. We are arrested already. You mean for the City Police?

Q You have been arrested and you have been charged and arraigned in the Federal Court for the skyjacking and piracy, I'm questioning you. Before I question you and if you have any questions to talk with your lawyer and I want you to understand that before I question you.

A I understand.

Q Are you willing to talk to me having been advised of your rights, are you still wanting to talk to me?

A Yes.

Q There are several areas with regard to the hijacking. When did you plan the hijacking?

A About four or five months ago.

Q And how did you come about deciding to do this?

A To do hijacking?

Q Yes?

A Well, I was thinking all th time. It is almost ten years I'm out of my country, how to help my people and how to get the truth to the entire world.

Q When you planned this hijacking and had decided this several months go, were you with anybody when you decided this talking about---?

A No.

Q Where were you when you decided to do this?

A Well, I didn't decide it at once you know. I was thinking all the time to tell you the truth. I got the idea one time and I was watching that movie "Hennessey" called"Hennessey", an Irish guy went to the British Parliament as a walking bomb.

Q This was on television?

A That was on television and it was playing in town too.

Q Where were you when you were watching this television?

A Well, in my place, in my apartment. And the movie I saw, I think at the Radio City Music Hall.

Q And that was about four months ago?

A It could have been before. I hadn't decided it when I was watching it. I kept it in mind as a good idea you know.

Q That would be a good idea to hijack a plane?

A It wasn't an idea of hijacking a plane. See, I put myself in the same situation as the Irish guy and I wanted for example, I was thinking how could I some day be able to get in the Belgrade Parliament and I would destroy them all for example that---.

Q You got the idea of the bomb about four months ago?

A Yes.

Q Now, Mr. Busic, when did you have any discussion with anybody else with regard to this plane hijacking and bomb?

A I didn't talk to anyone exactly about plane hijacking. I was talking to some Croatians and later I was talking to some of my friends who are today in prison with me and doing something for Croatia. I never told anybody about hijacking or something or the thought. I was thinking all the time by myself and getting all kinds of ideas and stuff like that.

Q When for the first time did you have a discussion with the other four defendants about the hijacking?

A About hijacking?

Q Yes?

A I never did.

Q Did you have a meeting with them at the restaurant here in New York, in Manhattan, near Central Park?

A Yes, I did.

Q When was that meeting?

A On Thursday night.

Q That was Thursday night before the hijacking?

A Right.

Q Who was present at that meeting?

A All five of us.

Q When you say all five of you, who do you mean?

A I was present, and my wife Julie, Mark Vlasic, Petar Matavic and Frane Pesut, and that was the only time we met and that was the time I introduced one to each other. They didn't know each other, but they never knew that they would go in some kind of action together. They realized that Thursday night of this month.

Q Could you tell us please what you discussed that night at that restaurant?

A Well, I told them that we are--the time has come and we are going to do these things. They never knew exactly what?

Q What things are you talking about?

A Helping some Croatians in some kind of unusual way and I gave them all the orders. We didn't talk that much there because there were some waiters from Hungaria and somebody might be listening to us and so I just gave them later on when we came out I gave them all orders separately to each of them. I gave them tickets for the plane, I gave them orders when to come to LaGuardia Airport and what to bring. I gave them leaflets in their suitcases and I gave them everything.

Q Before you gave them direct orders separate and apart, did you discuss--what did you discuss when all of you were together up in the restaurant with regard to the hijacking?

A Well, as I said: we didn't discuss very much. I told them we are going to fly somewhere and later on I gave them tickets. I told them we are going to fly to Chicago.

Q What else did you tell them was going to happen?

A Well, everything was mysterious for them. I told them not to ask me any questions. If they trust me they can trust me and I didn't trust them and I told them that and if they are willing to go to the action they are welcome. If they are not willing then or if they are not willing without asking any questions then I won't take them either. So---.

Q At what point did you tell them that you had planned to hijack a plane with them?

A Pardon me?

Q At what point did you tell them that you were going to hijack the plane, that is the reason you were going on the plane?

A No. They didn't know what I was going to do. For example, I told them I'm going to try to sneak some leaflets before we land in Chicago.

Q Sneak some leaflets where?

A Through the window. They don't know anything about planes. I knew everything exactly what was about and I told them, I told them lies too, that is included. That included the whole operation, you know, they believed me.

Q If we can go step by step, where was that restaurant that you had this meeting?

A On Top of the Park.

Q And where is that located?

A On 60th and Broadway, up on the 43rd floor.

Q In Manhattan?

A In Manhattan, right.

Q And when you were talking to them together, what if anything did you say about going on this plane?

A What if--?

Q What if anything did you say to them about going on the plane the following evening?

A I gave them tickets. I gave them tickets about 1:30 in the morning. I didn't give them up there.

Q Where did you go after there?

A We went to pick up leaflets.

Q Where was that?

A That was 101 5th Avenue where I printed them.

Q What street would that be?

A Fifth Avenue, 101, that is between 17th and 18th street.

Q And you say you printed the leaflets up there?

A Yes.

Q And was it that location you gave them the tickets?

A No, it wasn't. That was somewhere around my apartment.

Q Was this inside your apartment?

A No, outside. They were coming, each of them was coming with a car. They were coming in cars and I gave them tickets.

Q Separately?

A Separately.

Q Did you give them instructions?

A Yes.

Q What instructions did you give them?

A Well, to Vlasic, I said he was the first one who came, I said here is your ticket and your name is so and so.

Q What name did he have on the ticket?

A Your name is Marik, and you're supposed to come to LaGuardia Airport to T.W.A. at 5:15. I told him I will be there at 5 o'clock. Exactly at 5:15 you have to be there.

Q If I may say this, where were you standing when you were talking to him, what location were you at when you were talking to Mark Vlasic and you gave him the tickets and his instructions?

A I was standing at the corner of West End Avenue and 76th street, right in front of my house, my apartment.

Q What is the address of your apartment?

A 303 West 76th street.

Q How long have you lived at that address?

A About sixteen months.

Q And who do you live there with?

A My wife.

Q Continue, please. You were talking to Mark Vlasic and you gave him directions?

A To come there and follow me. If I comb my hair with my hand and go somewhere, he has to come after me about two minutes. If I go to the toilet he has to come there and I will give him further instructions.

Q That was when you were on the plane?

A No.

Q Let me clarify my question. You were giving him these instructions so that when you put your hand in your hair, where would you be when this was supposed to take place?

A   In LaGuardia Airport. And that was good for all time until I start to talk to them clearly everything.

Q   That was before you would get on the plane?

A   Even after, until I start openly talking to them. That was instructions for each of them. So, Matavic, he has to be there at 5:30 exactly and give suitcases--check in suitcases and get his seat and what kind of seat too. I told him to take first class, non-smoking.

Q   What name did he have on his ticket?

A   He had the name Aradisch (phonetic) and I told him exactly like I told Vlasic and follow me and no questions at all. Don't come near to me and so he did and I gave that same instruction to Frane Pecut just with a difference of time. I told him to come at 5:45 and I told all of them to get in separately, don't go through the control before you see I'm through. So, when I'm through then you can come. And if I'm not through then you don't have to go at all or you can go but that plan might be stopped right there and they might discover you and connect you with me somehow and you're just going to get in trouble. So it would be better they have false names as they will not discover you and go home.

Q   What name did you give Frane Pecut?

A   I gave him Hoss.

Q   Could you spell that?

A   H-O-S-S.

Q When did you buy these tickets?

A I bought two tickets on Monday morning. I don't know what date that was.

Q That was the Monday of the week of the hijacking?

A Right. And I bought those in Gimbel's for me and my wife, and I reserved that day two tickets for Vlasic and Pecut under the name of Mirick (phonetic) and Hoss and evening--I bought--I went myself to LaGuardia Airport to check these planes, how they go and how long time is between these planes. The plane was supposed to leave at 6:45, but they are all a little time around and I wanted to see them getting up and so. That evening I would say about 6 o'clock or 5:30, I bought a ticket, first class ticket for--.

Q What day of the week are we talking about?

A On Monday, same day.

Q So, Monday you bought the tickets?

A I reserved them on Monday and I wanted to be sure all be on the plane and we can take the action and so--.

Q How did you pay for these tickets?

A Cash.

Q Now, other than the tickets, did you give either to your wife or to Mark Vlasic or Frane Pecut or Petar Matavic anything else?

A No.

Q Did you give them leaflets?

A Leaflets, I said before I gave them leaflets.

Q At anytime did you tell them about the hijack before you got on the plane?

A No.

Q Now, did you ever have any conversation with them about making any bombs on the plane and tell people on the plane they were real bombs, when in fact they were fake bombs?

A No.

Q Did the people that went on the plane with you namely the four other defendants that we referred to, did they know that the bombs that you made on the plane were fake?

A You mean the passengers?

Q Well, let's talk about the other four defendants?

A Well, sometime in the beginning they thought they were real bombs.

Q What point was that?

A That was my plan. If they didn't want to listen to my plan and they are in the same situation as other passengers.

Q They were blindly following your directions?

A Right.

Q What if anything did you carry on the plane with you?

A Pardon me?

Q What did you carry on the plane with you?

A You mean the whole things?

Q Yes, as best as you can recall?

A Underwear, socks, shorts, blue jeans, my shaving stuff, electric bell wire, transistor with one battery, with two extra batteries, flase explosives, leaflets, switches, three switches unpacked and there were prices on them and two, this protection tear gas, two small tubes, you just press it.

Q Aerosol cans?

MR. LANDSMAN: It is like a pin.

A It is like a pin, and it is for protection.

Q Is it mace?

A I don't know the name. The police has that.

Q Now, did you have any black electrical tape?

A Yes, I did.

Q Did you have a white electrical switch?

A Yes.

Q And did you have a pot?

A Two pots, yes, I forgot that too. They found that in the control, in fact, in my purse, in my handbag. They checked that and I took that out from my handbag and because this pots gave them a signal, something is in it and I took that out and they opened and saw there was a present card and wrapping paper to wrap that and there was--

and they opened my, I believe, my valise and things for hair and cosmetics.

Q Did Julienne Busic, your wife, know you were going to hijack this plane?

A No. She knew that I was doing some kind of weird business for Croatia and she tried to figure it out and she didn't want to go and I said go this way and don't ask me anytying or bye, bye.

Q When you say weird business for Croatia, what do you mean?

A I was doing all the time things and she was interested in it and she always after that thing finished well, that was pretty weird and unusual and that is what I called weird and illegal. So, I didn't want to tell her that it was completely illegal because she as an American probably wouldn't agree with me, So I told her anyway. There is no possibility of hurting anyone or there is nothing very much will happen to us and so she believed me.

Q So, you just told these people they were going on a flight to Chicago and you would drop some leaflets off?

A Yes.

Q Now, when you were boarded on theplane and your four colleagues boarded the plane with the other passengers did there come a time when you go and put that pot together and you taped it up; is that correct?

A Yes.

Q When does that happen and where does it happen on the plane?

A On the plane. The plane was waiting there for I don't know why, but anyway because of weather or something else. It didn't get off for forty minutes and the plane was waiting and thought somebody might figure out something about me and so--but it wasn't that soon after the plane took off. I took that out from my purse, from my handbag. The whole thing was in my little purse.

Q This is the pot we are talking about?

A No. Thepot was still in it.

Q Yes?

A The pots were in my purse until after I took control over, then I ordered to Vlasic, he made one or both pots, I'm not sure. I ordered them to make the pots and I have explosives in the cabin and I'm going to hijack the plane and after I took control, I took control over them.

Q When did you say that, that you were going to take over the plane, that you had explosives on you, when did you say that?

A After I put the explosives on me.

Q When did you put them on?

A In the toilet.

Q What about the pot?

A I made the pot with them later, after I took control. We had enough time and we were working around and I was sending Julie to bring one and take my purse there and we arranged the whole thing.

Q Where did you arrange the whole thing when you say the whole thing, where did you arrange the whole pot?

A On the way to Montreal.

Q What part of the plane?

A In the front andin the back.

Q When you say the front what do you mean?

A In the front right by the cabin.

Q Where the pilot is?

A Yes.

Q In the cockpit area?

A Yes.

Q Who helped you put the pot together?

A Vlasic made one in the back.

Q Were you with him when he made this up in the back?

A I was with him just a little bit. I gave him orders.

Q What order did you give him?

A Make that pot and get it together and the same way I have it here. This goes here and put electric tape over the pot.

Q The same thing I have here, you pointed to your--

did you refer to the bomb you had on you?

A Yes.

Q And he by himself in the rear of the plane put that pot together?

A Yes.

Q Did you give him the tape and switch and everything?

A I gave him everything.

Q He put it together himself?

A Yes.

Q And at that point did he know it was a real or fake bomb?

A I don't know what he thought, you can ask him. I think he thought it was a real bomb. He didn't have any other chance.

Q Now, where did you put the other pot together? One pot Mark Vlasic put in the rear by himself, there is another pot involved, isn't there?

A Yes. I don't believe I remember exactly, because I was nervous. I believe I ordered him to make them both.

Q You made Vlasic make both of them?

A Yes. And to give one to Pesut.

Q Did he ever give one to Pesut?

A Yes.

Q And did Pesut hold on to it?

A Yes.

Q So Vlasic had a pot taped up with wire and so did Pesut?

A Right. And I had that thing in the pocket here with wires over me. Here was the battery and here was the switch.

1 Q When did you tell your colleagues these were fake bombs?

A Well, I didn't really let them know 100% that it was a fake bomb but I was joking with them, what if I press these things here now, what do you mean we are going to be killed all of us. Well, that is not a real bomb, that is just a joke and don't tell anyone else. I don't think they believed me. I really don't know when they figured that out exactly 100% if they believed me. I was not so serious when I was talking about it. When I broke that fake explosive and this thing came out and then they believed it wasn't. So, I don't know.

Q When you first took over the plane, did you get all of your four colleagues and tell them it was a hijacking?

A Yes.

Q And was that when you took over the plane?

A I took the plane myself and I was--I came out after they gave the message. I called Julie and told her I'm going to hijack this plane now and I gave the message and you're supposed to call Vlasic and take to him this, my handbag, and bring here my handbag I told her and so I'm going to give him and others following instructions and so---.

Q Did all five of you get together in the front of the plane when you first took the plane over?

A Now let me think. Idon't know exactly. I don't think Frane Pecut came there in the beginning.

Q Did your wife come up to the cockpit in the beginning?

A Yes. She was there after awhile. She was looking what I was doing and so--.

Q Did Mark Vlasic come up to the cockpit there?

A Yes.

Q Was he with your wife also?

A Yes.

Q Did Petar Matavic, while you and Mark and your wife were up in the cockpit?

A Yes, he was there. He was there most of the time because he was--his duty was only to stand by the door and either stand by the door or sit in the front seat there in the front passenger, so he did.

Q Now, what was your contingency plan if they ever called your bluff? Well, you had no live bombs on the plane, right?

A Yes.

Q What was your contingency if your bluff was called?

MR. LANDSMAN: If he had one.

A Make them not believe I would play serious, but if they know I would give up. Naturally, what else could I do. One guy for instance told me that he knew from the beginning that wasn't an explosive.

Q Who told you that?

A I don't remember his name. He is kind of older fellow, I would say about 45 or 50 years old.

Q He was a passenger?

A Yes, a passenger. And Iasked him how do you know, well, you guys didn't look like killers to me. So, I don't know if I believed him or not.

Q When you and your colleagues were up in the front of the plane in the cockpit and you told them it was a hijacking, what did they say?

A Well, I told them before we got to go. I told the pilot and the pilot had that in the message. He knew the plane was hijacked even before I came there.

Q How did he know?

A By the message I sent to him. I said this plane is hijacked and then further instruction for about that bomb in New York City and this other bomb which was just as clearly and our demands and everything else I mean. After two minutes I came in and I showed myself with those things and he believed completely and I took over command and ordered him to fly towards Europe and he told me he couldn't and we arranged to take some more gas in Montreal.

Q When your colleagues came up to the front of the plane and they realized this was a hijacking and they were helping you, what did they say?

A They were a little bit arguing with me and they said what do you mean, how is that going to be, what is going to happen with us, where are we going so far and I said forget it, I don't have time to answer these questions. You just have to follow my instructions and I'm commanding this plane now. Neither you or anybody else--what I say had been done and that is all, that was it.

Q And did they follow your instructions about aiding you in the hijacking?

A Yes.

Q You just mentioned that you gave a note, a typewritten note to the pilot?

A Yes.

Q You gave it to the cabin boy who gave it to the pilot?

A Yes.

Q I'm showing you this Xerox copy of a note, would you look at it and if you would, take a careful look at it first?

A (Defendant doing so)

Q Do you recognize that note?

A Sure.

Q Is that a copy of the note that you gave to the pilot?

A Yes, it is.

Q Now Mr. Busic, that is a typewritten note, right?

A Yes.

Q Where did you type the note?

A In my home.

Q In your apartment at home?

A Right.

Q Whose typewriter did you use?

A Marijan Gabeleca.

Q You said that while the stenographer was writing the spelling of the individual who you borrowed the typewriter from, while he was writing it on his tape, you said something about using the typewriter; is that correct?

A I was using that typewriter for many purposes before too, because this fellow, this friend of mine had three typewriters and he borrowed me that one and this was for a longer time in my apartment and I returned it back to him that day.

Q Just for the record, would you sign your name where along side you printed the name of your friend and put down today's date if you would please?

A (Defendant doing so.)

Q Now, for the record, this is a xerox copy of the note that you gave to the pilot; is that correct?

A Yes.

Q And there are six numbers listed on this?

A I guess so.

Q On this note that you typed up, correct?

A Yes.

Q Number one, this plane is hijacked and this plane will be landing in the direction of London, England; is that correct?

A Yes.

Q And you indicated in the body of the note that there is a bomb that you left in a locker on the Grand Central Station complex; is that correct?

A Yes.

Q Did any of your colleagues ever see this note?

A No.

Q Did you talk to them about the substance of this note while you were on board, on the flight?

A No. I had that in an envelope and I closed the envelope. So just--I guess the pilot was able to destroy the envelope to take it out, the note.

Q Do you know what ultimately happened to the note that you gave to the pilot?

A I guess they still have it and they asked what should I do with the note, you can keep it for yourself.

Q Now, Mr. Busic, if everything went well with your hijacking plan, how were you going to escape that plane.

A I was planning to go to Croatia and take out this five suitcases and one box of leaflets that I believed that contains 60,000 leaflets Croatian language. I was planning to take this out that was inside with the luggage and put it up with the passengers and go to Croatia and throw the leaflets over Croatia and come back to somewhere, Europe and France, and fill up again and gas and return to United States. That was my plan.

Q And what was going to happen when you came to the United States?

A I was going to give my self to the courts.

Q Now, you indicated, when I spoke to you on Sunday that you put this bomb together. Now, I'm referring to the bomb that you put into the locker in Grand Central Station; is that correct?

A Yes.

Q Now, I'd like to ask you some questions about that, is that alright?

A Sure.

Q When did you decide that you were going to make a bomb, that was part of your plan to aid you in the hijacking?

A Well, I couldn't tell you that exactly because I was thinking about thousands of possibilities how to convince Police and F.B.I. that I have real stuff on the plane real explosives and couldn't tell you when exactly I decided to make that bomb because I had that stuff for, I don't know exactly, three of four months, and I was thinking how I can use that somehow to convince everybody now that the lives of the people in the plane is in danger and they have to do these demands. So, really when I decided to make it and so, exactly it wasn't long ago. I don't think--it was about I say about three or four weeks ago, it might be.

Q You say you had the material for the bomb for several months; is that correct?

A Yes.

Q Where did you have the material for the bomb for several months?

A Well, I answered you that question many times. I bought it from that fellow I met in some bar between 79th and 80th and 3rd Avenue.

Q Did you know this fellow that you bought this material from?

A No. I didn't have any information on him and I don't know if I would have it. I wouldn't be able to give it because these people might be very dangerous for me. I have family here so--.

Q Did you know this person before you went to the bar and purchased the material for the bomb?

A No.

Q How did you know he was in the bar?

A I don't know. I didn't plan to buy anything. It was a coincidence and he asked what I was doing for a living and I said well, I'm a revolutionary and he laughed at me and he said he was Italian. I asked if he was Sicilian and he said why did you ask that, and I said if you're from Sicily you're Mafia and we were joking and he told me if your a revolutionary, you need some kind of hot stuff. Well, I might need some. I have some explosives and he asked did I have money and we arranged and that was in fifteen or twenty minutes. And after we did that business he shaked my hand and he said we haven't seen each other, don't forget it.

Q Did he have the explosives in the bar?

A In a trunk.

Q Right in the bar in a trunk in the bar?

A No. The trunk in the car that--.

Q It was in the trunk of a car that was parked outside?

A Yes.

Q So, it is very lucky for you that you met somebody to get explosives that nighjt?

A I don't know.

Q Could you describe that fellow to us?

A I rather not. Really, it is pretty dark in that bar and I didn't even want to look into him straight, and I didn't want to show my face that good.

Q What did he charge you for the equiptment?

A He said if I have $200, he is going to give me pretty size of material and blasting cap.

Q What exactly did he give you for $200?

A He gave me eight sticks of explosives.

Q What kind of explosives was that?

A Forty percent gelignite.

Q Is it dynamite?

A I believe it was plastic. I believe it was plastic.

Q Did you know exactly what you were buying for $200?

A It was written explosive.

Q It was written on where?

A On each stick.

Q And you believe it was an explosive and you gave the man $200?

A It stunk very strongly and I know about explosives and I read a book about it and I believe it was.

Q And when you say you read books about it, what kind of books did you read about explosives?

A Well, I read for example, the Anarchist Cook Book and others, I don't know the name and part of something.

Q That is the Anarchist Cook Book?

A Yes.

Q And does this book tell you how to make a bomb?

A Yes.

Q When did you read that book?

A About five, six, maybe seven monthsago. I saw that book first time in 1971.

Q Where did you see that book at the first time?

A At the library, at the book store.

Q Have you ever smelled dynamite before, before you purchased it from this fellow before?

A Not this kind of dynamite.

Q What other kind of dynamite did you smell?

A When I was in High School.

Q That is a long time ago, right?

A Yes.

Q How long ago was that?

A About twelve years ago.

Q Other than that have you ever had dynamite in your hands before?

A No.

Q Q Now, you say this was about three months ago that you purchased this dynamite?

A About three or four months ago, I don't remember exactly.

Q And you took it home with you?

A Yes.

Q And that was your apartment at 303 West 76th street?

A Right.

Q And that is apartment number six?

A Right.

Q Now, when did you actually put the bomb together when did this take place?

A I put the bomb together on Tuesday night.

Q That is the Tuesday night of the week of the hijacking?

A Right.

Q And when did you actually connect the entire bomb apparatus together, was that Tuesday night?

A Right.

Q Where did you keep the bomb in your apartment when you connected it together?

A In one of the--I had two cabinets for the dishes and food. In one of the cabinets and one of the cabinets where was most of pans and things and dishes, I put it down below on the bottom one.

Q Is that in the kitchen area of your apartment?

A No. We didn't have a kitchen, it was a studio apartment.

Q And you were living with your wife Julieene?

A Yes.

Q I'd like to back track if I may. Where did you keep the dynamite after you purchased it three or four months ago?

A I kept it a short time under where you take a shower and bath.

Q Under the bathtub?

A Under the bathtub in plastic, in this--I wrapped it in plastic because it smells very much and strong and one time, I don't know for how long, I kept it there and then I put it under in our cabinet for the clothes, down in the bottom and put some kind of shoes, all kind of shoes. It wasn't that big, it was not even so big. It was--.

Q You're indicating about six inches in length, when you did that, just for the record?

A Well, let's say it was so.

Q You're sort of putting your fingers in a circular fashion indicating a sphere six inches in diameter. You lived in a small apartment?

A Yes.

Q So, I take it that the apartment had an odor that was unpleasant?

A My apartment what?

Q Your apartment must have had a terrible odor because you said the dynamite had an odor?

A The dynamite had what?

Q An odor or smell?

A I wrapped it right away. I wrapped it very much in the plastic. It didn't smell at all afterwards.

Q Now, could you tell us, as best you're able, how you actually constructed this bomb?

A Sure, I will. I was testing that way of making it with my transistor radio. I bought a switch, I bought electric bell wire and I bought battery and this transistor Transistor battery I didn't buy battery in that time because I had the transistor and I was thinking, well, this transistor is explosive now and these wires are the wires going out from that blasting cap. So, and then I put together the switch, I cut the wire, put together at one end and one end and another end and another end of the switch and this wire continued and I cut it again. I put a battery and one end plus and one end minus and contained these two ends. I just pressed with a transistor, my transistor, and it worked. I put that together, these two ends of transistor, and I tried with my switch and it was going on and off and I was listening to music and everything, and what my wife was doing, I was practicing and I was lazy. When I was in bed I wanted to listen to the transistor and I was experiencing that was all.

Q And that is how you put the bomb together?

A Yes.

Q And you did this Tuesday night?

A Yes.

Q How many sticks of dynamite did you use?

A All of it.

Q Where did you get the idea to putit in a pot?

A From my head.

Q Did you ever talk about this with Mark Vlasic?

A No. (Nodded head in negative manner)

MR. LANDSMAN: Wait a minute. You have to say something. Don't shake your head.

Q You nodded negatively?

A No.

Q You know he is an electrician?

A Yes, I do.

Q How long do you know Mark Vlasic?

A I know him since I was a little kid. He was in another village.

Q So, you knew him from your---?

A Yes.

Q Now, did you leave some wires that were sticking outside of the bomb?

A Yes.

Q What was the purpose of doing that?

A For the police to see it so they wouldn't hurt themselves. They could cut the wires and take the bomb in parts.

Q And once they would have cut the wires the bomb would not go off, is that what you're saying?

A Right.

Q How did the bomb go off?

A I don't know. You must know better than I do. That bomb could stay there, I believe, for ten years, it wouldn't explode without pressing that switch. There was no other way to put that bomb in action and explode it.

Q You said you read about bombs, right?

A Yes.

Q You're an intelligent man?

A I believe I am.

Q You're a well read man?

A Pardon me?

Q You're well read man, you read a lot?

A Yes.

Q You know that bombs are volatile objects?

A Yes.

Q And they are unpredictable?

A Well, not this electric--if you have electric blasting cap, they can't go off without electric.

Q You know that generally bombs are unpredictable, wouldn't you say that?

A I don't know. I don't believe it. Otherwise I wouldn'tkeep it in my apartment. See that is---.

Q You would not have let your wife play aronnd with a bomb, would you?

A No.

Q Because they are dangerous?

A Well, I wouldn't let any kid or anybody--I was sure when I was doing it, it couldn't happen anything.

Q The reason you wouldn't let anyone play around with it is because it is a dangerous object?

A Yes, that's for sure. Like a pack of cigarettes.

Q Your purpose of putting that live bomb there was to give you credibility with the authorities so that they would believe you had live bombs on the plane?

A That is right.

Q And that is what you said to me Sunday; is that correct?

A I believe so.

Q Didn't you think that you could achieve the same things without that live bomb in the locker?

A I don't believe it.

Q That is if you had live sticks of dynamite there it wouldn't be good enough, is that what you're saying?

A Well, I thought it might have been good enough but I thought this thing is so sure and so secure and why couldn't I do it and if the pilot or whoever reports what kind of dynamite and what kind of cycle we have there they are going to be sure that we have the same things up there and so I put them together. I mean I was so sure about it, so sure nothing will happen or nothing.

I thought well, if they don't do anything, they can wait until I come back and I will take it apart and we were going or wait until this action was over or something.

Q Now, you made up that bomb and you wrapped the tape around it, right?

A Yes.

Q And you thought that the police would believe that you had bombs that were similar on the plane, right?

A Yes.

Q And were you willing to describe the bomb that was similar to the one that was down there in Grand Central Station?

A Sure.

Q And that was the reason you brought these two pots on the plane; is that correct?

A That is the reason, right.

Q And because you had made a big pot and you wrapped it up and left it in Grand Central Station?

A Right. If they would have called me in Montreal I would have told them exactly what to do with the bomb. I asked the pilot, I asked him twenty times did they find the bomb in New York, did they find the bomb in New York. Because I wanted to make sure that if they needed any information I would take the radio and tell them and then he told me they found the bemb and it is dangerous like you said and we have to listen to you and they found---.

Q Did you ever tell the police or anyone one the airplane how to take the bomb apart?

A On the airplane?

Q Did you communicate with anybody on the plane?

A Nobody asked me.

Q And you didn't volunteer it?

A Pardon me?

Q You didn't volunteer it. You said nobody asked you, so you didn't tell them; is that right?

A So far I can't remember. I didn't tell anyone how to take it apart, but I told the pilot this bomb can't go off. This bomb is secure one hundred percent.

Q This bomb can or cannot go off?

A Cannot go off.

Q That is the bomb that you placed in Grand Central Station?

A Yes.

Q Were you telling the truth then?

A Yes.

Q But the bomb did go off?

A The bomb did go off, but how did it go off. I don't know how it went off. I still don't know what these people took that bomb from Manhattan to the Bronx and what they did with it and how did they try to turn on and what happened. I have no idea.

Q Mr. Busic, do you have any objection if the police went into your apartment and searched your apartment?

A No.

MR. LANDSMAN: Well, I will place on the record that I have told him that his apartment was already searched and according to the newspaper, there was a search warrant and the apartment was searched before he got back to the United States. At least that is what the newspaper said.

MR. TANENBAUM: But you did inform Mr. Busic that his apartment was searched?

MR. LANDSMAN: That is right.

Q I will tell you, Mr. Busic, there was a search warrant and that your apartment was searched and that search took place on Sunday. Now, Mr. Busic, even if the police had not searched your apartment with a search warrant which has been done, would you have any objection to the police searching your apartment, simply, would you have given your consent the way you have just done, to the police to search the apartment if we didn't have the search warrant?

MR. LANDSMAN: Before he answers that question, I think that he ought to have some instruction because I think that this question unfortunately has legal connotations to it.

MR. TANENBAUM: At anytime you indicated before the questioning Mr. Busic would answer questions that he wanted to and he would have the right not to answer any questions.

MR. LANDSMAN: He is not objecting to answering the questions, but before he answers it be informed of it.

MR. TANENBAUM: Just take as long as you wantto. Take your time.

MR. LANDSMAN: Your apartment was searched pursuant to a search warrant and it may turn up that a search warrant was defective and illegal search warrant and whatever was found in your apartment cannot be produced as evidence in court. What the District Attorney is asking you now in effect is to consent, a late consent to a search that took place sometime ago. In other words, if you consent to have your apartment searched, the question of whether or not the original search was illegal may never come up. Do you understand what I'm talking about?

MR. BUSIC: Yes.

MR. LANDSMAN: Now knowing this.

Q Let me make my point. I'm not suggesting in any way, there was a defective warrant. About the search warrant, it was signed by a Judge of the Supreme Court, Burton Roberts, and I tell Mr. Busic, we found white electrical switch and we found the Bell wire and roll of black tape and other things. And you know what you had in your apartment and I want you to know that we went and searched your apartment with a lawful search warrant and we found some material, some evidence. So, if you would like to answer the question, if you want me to restate it, I will be more than happy to re-state it?

A What was the questions?

Q The question is would you give the police consent, the District Attorney and/or the police to go and search your apartment?

A Sure I would, yes.

Q You would have done it?

A Yes.

Q Now, and if we would like to go back into your apartment, you would give us consent to do that?

A Yes.

Q Now, could you tell us when you typed this letter and again I'm referring to the letter that you, referring to the list of statements, that you gave to the pilot. When did you type that up? I'm showing that to

Mr. Landsman for the record?

A Friday morning about 10:30 or 11 o'clock.

Q And you on Sunday you will recall I'm sure, I showed you the list of demands that you typed up which you left with the bomb in the locker, do you recall that?

A Yes.

Q And you signed it and dated it, do you remember that Mr. Busic?

A Yes.

Q And again I'm showing it to you and to Mr. Landsman your lawyer. Just for the record, it is a nine page typewritten document on white sheets of paper and there is a covering sheet which I'm not including in the count. I'm now showing it to you and your attorney?

A Nine pages, yes.

Q You said yes, and you were reading the document which I handed to you and you're reading the document I gave to you Sunday; is that correct Mr. Busic?

A That is right.

Q And you typed up this document?

A Yes.

Q And are the author of that document?

A Yes. I'm the author of that document.

Q When did you type up this document?

A Awhile ago, probably about ten days. I didn't type it at once. I typed it in a few days, about ten days ago or something.

Q And I say this document, it starts out here are the demands that must be immediately met; is that correct?

A Yes.

Q Did you discuss this document or contents with anybody?

A No.

Q Where did you type it?

A At my home.

Q Now, was your wife in the apartment when you made up the bomb and typed up these letters?

A She was not in the apartment when I made the bomb and but she was most of the time when I wrote, typed those things. And in fact I asked her many times how to write this word and this word exactly, and she asked me if I wrote some words. She asked me why was that, what is that evidence of and I didn't want to tell her. She was mostly reading a book or watching T.V. or listening to the radio.

Q Was she working during that week, the week of the hijack and the making of the bomb?

A No.

Q Were you working that week?

A No.

Q Where did you get the money to buy the dynamite with?

A Well, I had some money in the bank and I borrowed money from my friends.

Q Were you working at the time that you bought the dynamite?

A No, I wasn't.

Q What day of the week was that you bought the dynamite, do you recall?

A I don't remember that.

Q How long a period of time had you not been working prior to the time you purchased the bomb equipment,k the dynamite?

A I don't know. It must be about three months.

Q So, you were unemployed three months before you met this fellow at the bar?

A Yes.

Q Was your wife working during that period of time?

A She was.

Q When did she stop working?

A She stopped last week, I believe.

Q What was the reason she stopped working?

A Well, I told her to. Not to work anymore. She was bored with that teaching.

Q What kind of job did she have?

A She was teaching English to foreign students.

Q Where?

A Forty-second and Broadway. Some kind of private school.

Q Now, you took the key you said from locker 5713 where you placed the bomb and you threw it in the Hudson River; is that right?

A Yes.

Q You did that on what street? What street was that, do you recall?

A About 73rd I would say. Seventy-third or seventy fourth. Not very far from those boats and the station there.

Q Now, I'm going to show you this little diagram here, can you see that, Mr. Landsman, can you see that, Mr. Busic?

A Yes.

Q This area that is here below the park is the Hudson Park, you see where it says tennis courts over here. Here is 72nd street and if you continue down looking at this diagram you see it says foot path?

A Yes.

Q Does this look like the area you werein when you threw the key in the area?

A You go--72nd, where is that jogging circle, there is some jogging circle down there.

Q Is that north of 72nd or south of 72nd?

A It is towards upper Manhattan.

Q Well, describe the area, as best you can, where you threw the key in the Hudson, that is the key that you locked the locker that you put the bomb in at Grand Central Station?

A Is that 79th street, this here?

Q Yes. Where it says boat basin?

A Yes.

Q Yes?

A Here must be the jogging circle.

DETECTIVE MOHAN: Put it in where you think it is.

A Is this the Hudson River here?

Q Yes. Could you put your initials where you say it must be here?

A The foot path area, let's see. Is that a toilet here or what?

Q It says park house where you're pointing?

A It says park house but there is a man's toilet, a bathroom and then if that is a bathroom then I threw it here.

Q Could you put your initials on the diagram where you say you were, as best you can recall, when you threw the key into the river?

A You want my initials here?

Q If you would?

A (Defendant putting initials on diagram)

Q And today's date?

A (Defendant doing so)

Q Okay, thank you very much. When for the first time did you go to Grand Central Station and decide, the first time you decided to go put the bomb in a locker in Grand Central Station?

A I decided to do that probably about ten days before we hijacked that plane.

Q And you actually placed the bomb in that locker on what day?

A On Friday morning.

Q That is the day of the hijacking; is that right?

A That is right.

Q Had you ever been to this locker before then?

A Yes. I was there Wednesday.

Q What time of day?

A About one o'clock, I'm not sure.

Q Noon or one o'clock?

A Noon or one o'clock?

Q One o'clock in the afternoon?

A Yes.

Q And what was your purpose of going there at noon or one o'clock on Wednesday before the hijacking?

A I was looking for a good locker I can put that bomb in. I didn't decide for a long time. I was running around and I was thinkingif I put a bomb in a locker and some thief goes and tries to steal something from the lockers and if I find a bomb in it and he wasn't going to the police because he is a thief and he wasn't no way to do with this bomb and he would probably put the bomb someplace where somebody else be able to reach it and throw it in the water, and it would be of danger on one side and the other side the police wouldn't find it and we wouldn't succeed in our goals. So, I was planning to put that bomb in the luggage where you keep luggage at the Port Authority Trailways.

MR. LANDSMAN: Bus terminal?

A Bus terminal or Greyhound and I was there and I checked one time with one fellow who is working there if anyone else can put their luggage or only their passengers and he told me anyone else who pays for it can put luggage here and that is right there by the police. The police is up and down Trailways, from Trailways past this luggage station. So, but somehow I thought if it is possible for anyone to come near or play or they might throw this thing, what they could do they might be interested, what is so heavy in it and they might call police and they might discover that before we take off the plane, you know, before and then we would be stopped because everything was with the bomb, planned to put this papers and everything with the bomb and they would easily find us.

Q You mean the papers, you mean the demands?

A Yes. The demands and appeals to the American people and everything else. So, I was going around and I didn't want to put it in the lockers in Times Square because I had a fear someone might try to break in and steal it. Like I said, so I went to Grand Central Station at Wednesday and that was the day I picked the tickets from T.W.A Office on 5th Avenue. And I was looking there and I saw that was the only place in the subway where it was pretty crowded and there was a bank right near these lockers, and what's more secure somebody can steal, nobody will try to break in because there are police all the time because of the bank there. And so I said this is pretty secure and I decided to take that locker there. So, I went out and I was planning to buy shoes, new shoes. I went out and bought my shoes and then I came back with the old shoes, I kept the new shoes on my feet but the old shoes I put in the locker to reserve that locker for me for Friday.

Q You did that on Wednesday?

A I did that on Wednesday.

Q Did you tell any of your colleagues about this locker?

A I did not.

Q Are you sure about that?

A I did not.

Q Did any of your colleagues ever go to this locker area?

A They couldn't go. They didn't know, nobody knew.

Q The only way they could have gone there was if they knew; is that right?

A Right.

Q Mr. Busic, I will tell you in the interst of fairness that one of your colleagues went to that locker?

A Well, I don't believe that.

Q You don't believe that?

A It is impossible.

Q It is impossible. I also tell you in the interest of fairness that the evidence indicates that you discussed your plans for the hijacking with your colleagues in that restaurant?

A Well, that is what you say.

Q You said that never happened though; is that right?

A Right.

Q You're saying this because you don't want the other people involved, right?

A No, no. I'm saying that because it is the truth. If you're trying to convince me or if you can prove for example that one of the colleagues was around that area, I wouldn't believe anything else now I mean. They couldn't possibly know, they couldn/t. It is just impossible, nobody in the world knew about that locker and I--why should I lie about it, I mean. I have a reason to protect them probably.

Q You have a reason to protect them, don't you?

A No. If I would lie, that was probably because I would like to protect them, you can think so.

Q You would like to protect them, wouldn't you?

A I don't really know.

Q You were their leader, weren't you?

A Pardon me?

Q You were their leader, weren't you?

A See, if they love their country like I do and they are sympathizing, I can tell you they were on the plane, they were sympathizing with me and they realized they were not protesting very much. You can charge them with--I know they had to follow my instructions. I can tell you they did not protest about hijacking. They asked me what other plans I had and they had some kind of ideas, what are your plans afterwards and what should we do after but they didn't protest. If there is some illegalities, they should be punished for it.

Q It was a revolutionary action?

A I knew it was wrong.

Q When I said it was a revolutionary action, you knew it was illegal?

A I knew it was illegal. That was the only way

I didn't have no choice, so I took that one.

Q You say you had no choice because you were committed to revolutionary goals?

A Right.

Q And you were the leader of your group on the plane?

A Right.

Q Isn't it fair to say that you as the leader would like to take all the responsibility for what happened?

A Well, I don't know. I can't say I'm protecting my friends because see, I feel a little guilt because of them too. I feel a little--I lied to them a lot and I don't know if they would do itif they knew everything and now I want to make them up a little bit, you know.

Q You want to help them?

A I lied to them a lot and probably they wouldn't go and they would tell someone and everything would be screwed up and so, and I sympathize with their innocence for me. Example, they are innocent people in any illegal stuff., They didn't do anything. For example, when ^I look at this Fran Pesut, this guy he was scared himself, probably the most than any other passenger, and he was sitting there like a dead person all the time with these things in his hands and he couldn't do anything with his back.

Q That is because he thought it was a real bomb;

is that right?

A He thought or he didn't think, you can ask him he was sitting there.

Q You told him it was a real bomb in the beginning, didn't you?

A Yes.

Q And you told Petar Matavic it was a real bomb?

A He didn't have a bomb.

Q You told him that it was a real bomb?

A I told him one time it was real one time. It wasn't, so they were not sure. I don't know about Frane, He didn't want to talk to me. He didn't talk in general. He looked to me very often a dead person sitting. He didn't eat anything, he didn't drink anything, he didn't get up for twenty hours.

Q But when you first told Petar Matavic, you told Petar Matavic, as you say, that was a real bomb?

A Yes. But I didn't tell him, I believe he was able to figure out by my talking.

Q But when you spoke to him first about the bombs on the plane you told him, Mr. Busic, that those bombs, as you say, were real; is that correct?

A Yes. I don't think they ever believed me completely. I don't know. You have to ask them.

Q But that was the first time you talked about bombs on the plane or anywhere else?

A Right.

Q Was on the plane, according to you?

A Yes.

Q You sure about that?

A Yes.

Q Just one last area of inquiry, and that is when did you find out about the explosion that took place in New York?

A In Paris.

Q Was that before of after you surrendered?

A Before.

Q You found out before?

A Yes.

Q How did you find out before you surrendered that the bomb went off in New York?

A I was talking with my wife and the Ambassador of the United States, and my wife went to the police there and found out if our demands were met, and I talked to the Ambassador and she told me too. In fact, she told me there are three people dead in New York from some kind of bomb and I said come on, you're joking. We are just trying to do something, that couldn't happen and I didn't even believe and I didn't believe the American Ambassador and I made him call America again and ask for details about what happened because I didn't believe it and he did, and he called again and he talked to me again and he said yes, it was in the New York Times, one police officer is dead and the other two are injured very bad and you're in a very bad situation.

Q Did you talk to your other colleagues on the plane about that?

A Yes. I told them and they were scared and they asked me what is going on and we are in a big shit now and I'm sorry, and I don't know if it is true, and I don't believe in that completely and if it is, I don't know what to do. And I lost all my strength and I just couldn't, I didn't know what to do. And so after awhile we gave up. I still was thinking--see my action wouldn't be good at all if I killed anyone or something. Why should I kill American person or anyone for a Croatian cause, and I planned to go, I wanted to go so bad to Croatia and throw the leaflets down there, and after I found that out there I just lost interest in anything. So, I said well, we are going to give ourselves up.

Q Mr. Busic--?

A See, I was thinking could they lie to me about that just on purpose for some reason. I was thinking that over ten times. I said well, if that isn't happened then why would they tell me that. Then I can force the pilot to fly to Libya. Why would they tell me that thing. They didn't know that I wanted to come back to the United States anyway. Now, why had they talked about killing someone in New York City and I couldn't believe that. I couldn't understand that at all and just thinking about that, I just said well, whatever it is, I believed it probably forty percent that it really happened, but I didn't believe it one hundred percent until I talked to these F.B.I. agents.

Q Did your colleagues believe that the police officer was killed?

A Well, I didn't know.

Q You talked about it, didn't you, on the plane?

A I told them that is impossible. I told them, they asked me what was that, was that part of our action. I said well, I did have some bomb there, but I don't think it could hurt anyone.

Q What did they say?

A They said we are in trouble if it's the truth.

Q And that happened before you surrendered, is that what you say?

A Yes, it is. We had--like I read in the newspaper yesterday, we had some conversation and negotiating with eath other and I told them well, I'm going to order you now, I'm going to tell the Captain and I'm going to give myself up.

Q And now you say that you did that because you found out the police officer was dead?

A Pardon me?

Q You said that you were going to give yourself up because you found out the police officer was dead?

A No. I didn't want to go any farther.

Q Because there was a chance that a police officer was dead?

A Because any killing involved in this action would get the action over worst, not better.

Q And that is the reason why you gave yourself up?

A Well, that is not the only reason, that is one. I would say one of the main reasons I lost all my strength. I never thought in my life and never had the strength to help anyone else to kill or injure someone and most of all an American Police Officer because I lived in America so long and I do love America and American Democracy and everything because of me killing someone I mean it was an accident. I still have my full consciousness and I can't feel guilty about that death of the police officer but I do know exactly on this earth it wouldn't happened this officer would still be alive.

Q Remember telling me the reason why you surrendered Sunday did you tell me the same thing you're telling me now?

A I don't know what I told you because of these French were all around and that was another reason too.

Q You mentioned nothing about the police officer on Sunday?

A I did not.

Q Now, before you surrendered do you recall that? Do you recall?

A I don't know. If you say so, you had a stenographer there and he can find out but that was one police officer was the main reason. I believe now when I look like to my strength and as I can think, well, I didn't believe the tires--our tires were shot too. The French police or soldiers were running all over. When I look at it now, look back, I had strength to go anywhere. You can ask all the people, I was justlike in the beginning with all my strength and everything but after I figured that out, it just knowcked me down.

Q Isn't it a fact, that the fact that the police officer was dead had nothing to do with your surrendering?

A No, it's not the fact.

Q It is not the fact. Did either Frane Pesut and Petar Matavic ever visit your apartment in Manhattan?

A Yes, they did.

Q Did they visit your apartment during the week, that is last week, the week of the hijacking?

A Yes. One of them, Pesut, didn't because I haven't seen him. I don't know him that well and he didn't come to my apartment. He came one time a long time ago and I had to translate some books for learning how to drive a truck. There was sixty of these small books and he had to m[illegible] that brief.

Q Do you recall what day of the week he came over to your apartment?

A The day of the week?

Q Yes?

A I believe he came Tuesday night.

Q Tuesday night?

A Yes. About 8 o'clock I believe.

Q Eight o'clock at night?

A Yes. Right before I make that bomb. I mean after I made that bomb. I finished that bomb about 6:30 or something.

Q How long did it take you to make the bomb?

A About forty minutesto an hour.

Q And you knew when you made that bomb and it exploded and that anybody who was in a close proximity to it would get killed from that?

A Yes.

Q And when I say that, you knew that when you made it up and after that?

A I knew that bomb couldn't explode because I would put my life on it.

MR. TANENBAUM: Mr. Busic, I have no further questions and that is the end of the statement. Thank you.

JMP:SG
F# 763,251

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT and
MARK VLASIC,

Defendants.

- - - - - - - - - - - - - - - - - X

Bartels J

I N D I C T M E N T

Cr. No. 76CR662
(T. 49, U.S.C. §1472(i),
T. 18, U.S.C. §§371, 2)

9-21-76

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 10th and 11th days of September, 1976, within the Eastern District of New York and elsewhere, the defendants, ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC, attempted to commit and did commit air piracy as defined in 49 United States Code, Section 1472(i)(2), in that the defendants, ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC, by threat of force and violence and with wrongful intent did attempt to and did seize and exercise control of an aircraft within the special aircraft jurisdiction of the United States, to wit; a Boeing 727 known as Trans World Airlines Flight 355 bound from LaGuardia Airport, Queens, New York and en-route to O'Hare Airport, Chicago, Illinois, the commission of which offense resulted in the death of New York City Police Officer Brian Murray. (Title 49, United States Code, Section 1472(i); Title 18, United States Code, Section 2).

COUNT TWO

On or about the 10th and 11th days of September, 1976, within the Eastern District of New York and elsewhere, the defendants, ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC, attempted to commit and did commit air piracy as defined in 49 United States Code, Section 1472(i)(2), in that the defendants, ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC, by threat of force and violence and with wrongful intent did attempt to and did seize and exercise control of an aircraft within the special aircraft jurisdiction of the United States, to wit; a Boeing 727 known as Trans World Airlines Flight 355 bound from LaGuardia Airport, Queens, New York and enroute to O'Hare Airport, Chicago, Illinois. (Title 49, United States Code, Section 1472(i); Title 18, United States Code, Section 2).

COUNT THREE

On or about and between the 6th day of September, 1976, and the 11th day of September, 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendants ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 49 Section 1472(i), United States Code, by conspiring to commit air piracy as defined in 49 United States Code, Section 1472(i)(2) by threat of force and violence and with wrongful intent by seizing and exercising control of an aircraft within the special aircraft jurisdiction of the United States. (Title 18, United States Code, Section 371).

In furtherance of said unlawful conspiracy the defendants ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC committed the following overt acts:

OVERT ACTS

1. On or about the 10th day of September, 1976, within the Eastern District of New York the defendants ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC boarded a Boeing 727 known as Trans World Airlines Flight 355 at LaGuardia Airport, Queens, New York.

2. On or about the 10th day of September, 1976, on board Trans World Airlines Flight 355 shortly after said flight left LaGuardia Airport, Queens, New York, defendant ZVONKO BUSIC handed a letter to flight steward Thomas Van Dorn which stated:

> "1. This airplane is hijacked.
> 2. We are in possession of five gelignite bombs, four of which are set in cast-iron pans, giving them the same kind of force as a giant grenade.
> 3. In addition, we have left the same type of bomb in a locker across from the Commodore hotel on 42nd St. To find the locker, take the subway entrance by the Bowery Savings Bank. After passing through the token booth, there are three windows belonging to the bank. To the left of these windows are the lockers. The number of the locker is 5713.
> 4. Further instructions are contained in a letter inside this locker. The bomb can only be activated by pressing the switch to which it is attached; but caution is suggested.
> 5. The appropriate authorities should be notified from the plane immediately.
> 6. This plane will ultimately be heading in the direction of London, England."

3. On or about the 10th day of September, 1976, on board Trans World Airlines Flight 355 shortly after said flight left LaGuardia Airport, Queens, New York, the defendants FRANK PESUT and MARK VLASIC exhibited metal devices to the passengers and crew of Trans World Airlines Flight 355 and indicated said metal devices were bombs.

4. A bomb was placed in a subway station locker in the vicinity of 42nd Street and Lexington Avenue

5. On or about the 6th day of September, 1976, a Trans World Airlines ticket was purchased at LaGuardia Airport, Queens, New York in the name of S. Busic.

A TRUE BILL.

____
FOREMAN

____
DAVID G. TRAGER
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- : Judge Bartels

ZVONKO BUSIC, JULIENNE BUSIC, : 76 CR 602
PETAR MATANIC, FRANE PESUT and
MARK VLASIC, :

Defendants. :

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MOTION FOR BILL OF PARTICULARS

SIRS:

PLEASE TAKE NOTICE that the defendant Petar Matanic, by his attorneys Martin Elefant, Esq. and Paul B. Bergman, Esq. will move, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, before the Honorable John R. Bartels, United States District Judge for the Eastern District of New York, said motion to be returnable on November ,1976 at 10:00 o'clock in the forenoon thereof or as soon thereafter as counsel may be heard for the following particulars respecting the indictment herein and for such other and further relief as the Court deems just and proper:

AS TO COUNT ONE:

1. Set forth the means and manner by which the defendant Petar Matanic threatened the use of force and violence.

2. Set forth the means and manner by which the defendant Petar Matanic did seize and exercise control of the aircraft.

3. State whether the government will claim that the defendant Petar Matanic was a principal or an aider and abettor

in the crime charged.

4. Set forth what the indictment means by the expression "special aircraft jurisdiction" and the particulars by which the government will show that TWA flight 355 was within the special aircraft jurisdiction of the United States at the time that the acts alleged in Count One were allegedly committed.

5. Set forth precisely the time of the commission of the alleged crime charged in Count One.

6. Set forth precisely the ground location of flight 355 at the time of the commission of the crime charged in Count One.

7. Set forth the names of any persons, apart from the defendants named, whom the government will claim participated in the crime alleged in Count One.

8. Set forth the means and manner by which the commission of the crime of "air piracy" resulted in the death of New York City Police Officer Brian Murray.

9. Set forth the names of any persons, apart from the defendants named, whom the government will claim participated in any act or conduct which resulted in the death of New York City Police Officer Brian Murray.

10. Set forth the instrument and means by which the death of Officer Murray was caused, the time when said instrument and means was initiated, and the place at which said instrument and means was employed.

11. Set forth whether the government claims that the defendant Petar Matanic participated in any aspect of the matters covered by demand 10, above, and, if so, provide particulars as to:

(a) the extent of defendant Petar Matanic's participation in preparing the instrument means by which death was caused;

12. Set forth the names and addresses of all those persons, if any, who were present when Officer Murray's death was caused.

AS TO COUNT TWO

13. Demands 1 through 7, above, are repeated as if they were more fully and separately set forth.

AS TO COUNT THREE

14. State when the object of the conspirary was attained or when the conspiracy was otherwise completed.

15. State whether the conspiracy had any other unlawful objects other than the object set forth in the indictment; that is, the agreement to commit air piracy.

16. State whether the governement alleges that the conspirators agreed to commit murder to achieve the object of the conspiracy; if so, who among the named conspirators so agreed.

17. Specify any other conspiracies which the governmen alleges were participated in by the defendant Petar Matanic during the period between January 1, 1976 and the present.

18. State the names and addresses of all unnamed co-conspirators.

19. State the number of separate times, dates thereof, and the places, if any, that the defendant Petar Matanic is alleged to have met or conversed with the named co-conspirators or unnamed co-conspirators.

20. State all other places, other than the Eastern District of New York, in which the government will allege that the conspiracy operated and state the times thereof.

21. Specify the date on which, the time of day, and the place where the defendant Petar Matanic entered the conspiracy, if it existed before then, or began the conspiracy with another or others if it did not exist before then.

22. State if the government alleges or has information that the conspiracy charged in the indictment existed at any time prior to September 6, 1976.

23. Specify whether the government alleges that the defendant Petar Matanic knew of the contents of the letter set forth in overt act 2 prior to the time when it was allegedly handed to flight steward Thomas Van Dorn; if so, state the manner in which the government will claim such knowledge on the part of the defendant Matanic and state, also, those portions of the letter, if any, that the government will not claim that the defendant had knowledge.

24. State whether the government alleges that the defendant Petar Matanic, as it is alleged in overt act 3 as to defendants Pesut and Vlasic, "exhibited metal devices to the passengers and crew of Trans World Airlines Flight 355 and indicated said metal devices were bombs."

25. State whether the government alleges that the defendant Petar Matanic placed a bomb, or aided and abetted such alleged placement, as it is alleged in overt act 4 "in a subway station locker in the vicinity of 42nd Street and Lexington Avenue."

26. State whether the government alleges that the defendant Petar Matanic knew of the commission of overt act 4 and, if so, when and how it is alleged that the defendant Matanic acquired that knowledge.

27. State the name or names of the persons who the government will allege committed overt act 4.

28. State how many members of the alleged conspiracy or others knew, prior to its commission, of overt act 4. State their names.

29. State who the government alleges committed overt act 5.

30. State who the government alleges "S. Radic" to be.

Dated: New York, New York
November 8, 1976

Respectfully submitted,

Martin Elefant
16 Court Street
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Tel. (212) 624-2240

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Attorneys for the Defendant
Petar Matanic

TO:

Clerk of the Court

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	Judge Bartels
-against-	:	76 CR 602
ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC,	:	MOTIONS FOR DISCOVERY AND INSPECTION PURSUANT TO RULES 12(d)(2) AND 16, F.R.Crim.P. AND ALL EXCULPATORY MATERIAL
Defendants.	:	

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SIRS:

PLEASE TAKE NOTICE, that the defendant Petar Matanic, by his attorneys Martin Elefant, Esq. and Paul B. Bergman, Esq. will move, pursuant to Rules 12(d)(2) and 16 of the Federal Rules of Criminal Procedure, before the Honorable John R. Bartels, United States District Judge for the Eastern District of New York, said motion to be returnable on November , 1976 at 10:00 o'clock in the forenoon thereof or as soon thereafter as counsel may be heard, for the following relief and for such other and further relief as the Court may deem just and proper:

Rule 12(d)(2)

1. Statement, pursuant to Rule 12(d)(2), F.R.Crim.P., setting forth the evidence which the government intends to use at the trial of the above-captioned cause that the defendant would be entitled to discover in order to enable the defense to make motions in advance of trial and swearing of the jury, as may be advisable, pursuant to Rule 12(b)(3), F.R.Crim.P. The statement of evidence shall include, but not be limited to:

(a) all real evidence which was either taken from the person or residence of the defendant Petar Matanic or which will be offered in evidence against Petar Matanic;

(b) all written or recorded statements of the defendant Petar Matanic and the substance of any oral statement of the defendant Petar Matanic which the prosecution intends to offer in evidence at the trial;

(c) all written or recorded statements of each of the co-defendants named herein as well as the substance of any oral statements of the co-defendants which the prosecution intends to offer in evidence at the trial, in order to permit the defendant Petar Matanic to move for a severance pursuant to Rule 14, F.R.Crim.P., before selection of the jury or for such other relief as may be advisable;

(d) copies of all sealed and unsealed search warrants, affidavits, wiretap or electronic eavesdrop applications and orders, if any, which were prepared in connection with any one of the defendants named herein;

(e) any evidence, as to each defendant, which the prosecution intends to offer under the provisions of Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence;

(f) any evidence, as to each defendant, of prior or subsequent conduct which the government alleges would be relevant and admissible under Rule 404(b) of the Federal Rules of Evidence; and

(g) any eyewitness identification evidence and copies of all photographic spreads (corporeal and incorporeal) used by state, local or federal authorities in connection with the case.

Rule 16

2. Copies of all written or recorded statements made by the defendant Petar Matanic and the co-defendants named herein, including pedigree sheets, which are within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence shall become known, to the Assistant United States Attorney in charge of this prosecution (this request includes all "scratch" notes made by FBI agents and reports of local law enforcement authorities).

3. The substance of any oral statement which the prosecution intends to offer in evidence at the trial, during either the case in chief or in rebuttal, made by the defendant Petar Matanic or by any of the co-defendants.

4. Copies of the defendant Petar Matanic's and co-defendants' prior criminal records, if any, as compiled by either federal, state or municipal authorities.

5. Copies of all books, papers, documents, tape recordings, transcripts and photographs which are within the possession, custody or control of the prosecution, or which by the exercise of due diligence may be obtained by the prosecution, and which are (i) either material to the defense; or (ii) intended for use by the prosecution as evidence in chief at the trial herein; or (iii) which were obtained from or allegedly belong to the defendant Petar Matanic or any of the co-defendants herein. This request for discovery also includes but is not limited to:

(a) copies of every document, all tape recordings, and transcripts thereof which the government intends to introduce in evidence at trial;

(b) copies of the flight log of the TWA flight 355 alleged in the three counts of the indictment, as well as all navigational charts concerning said flight and all recordings made during the course of the flight;

(c) copies of the specification sheets and instructional books for the anti-hijack equipment, if any, in operation at the TWA terminal at LaGuardia Airport;

(d) copies of all documents relating to or which refer to any of the defendants which are in the possession of the government which were compiled, prepared or kept by either the Federal Bureau of Investigation or the Central Intelligence Agency prior to September 10, 1976;

(e) copies of all documents relating to or which refer to the Croation National Council, the Headquarters of the Croation National Liberation Forces, Sts. Cyril and Methodius and St. Raphael's Roman Catholic Church at 41st Street and 10th Avenue, New York City, the Croation Radio Club, the Croation Center, the Croation Soccer Club and the Croation National Congress, which were compiled, prepared or kept by either the Federal Bureau of Investigation or the Central Intelligence Agency prior to September 10, 1976.

6. Copies of all reports and results of all scientific tests or experiments which were conducted herein, and copies of all psychiatric or medical reports relating to the accused and all autopsy reports relating to Police Officer Brian Murray. Include, also, the curriculum vitae or resume of any expert witness that the government intends to call as a witness in its case in chief.

In addition, provide the names of the persons responsible for supervising, manning and operating the anti-hijack equipment in operation at the TWA terminal at LaGuardia Airport for TWA flight 355 on September 10, 1976.

7. Names and addresses of all persons who have knowledge pertaining to the case or who have been interviewed or examined by government agents in connection with the case. This discovery request includes the names and addresses of all persons who witnessed, either visually or auditorily, any alleged acts of the defendant Petar Matanic or the co-defendants named herein which the prosecution intends to prove. It also includes a request for a listing of all passengers on the September 10, 1976 TWA flight 355 as well as a seating arrangement of the passengers.

8. A list of the witnesses, together with their addresses, whom the government proposes to call at trial, together with a synopsis of their anticipated testimony.

9. All Federal Bureau of Investigation, Bureau of Prisons, and other governmental records, including records of state and municipal authorities pertaining to all persons the government plans to call as witnesses in this case.

10. State whether there has been any electronic surveillance of the defendant Petar Matanic or the co-defendants at any time during or before the investigation of this case; if so, furnish copies of all recordings, transcripts, court orders and applications made in connection therewith.

EXCULPATORY MATERIAL

11. All material known to the prosecution or which, through due diligence could be learned from federal, state and municipal governmental agencies or agents or prospective witnesses in this case which is arguably exculpatory material or favorable or useful to the defendant, Petar Matanic, or which may lead to exculpatory material. This material shall include, but not be

limited to, statements of witnesses, criminal records of prospective government witnesses, information relating to informants, if any, and character references laudatory to the accused. Also, include copies of all N.Y.C. Police Department regulations, instructional books, manuals and the like relating to the dismantling or detonation of explosive devices.

Dated: New York, New York
November , 1976

Respectfully submitted,

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16 Court Street
Brooklyn, New York 11201
Tel. (212)624-2240

Paul B. Bergman
Cunard Building
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Tel. (212)269-4900

Attorneys for the Defendant
Petar Matanic

TO:

Clerk of the Court

Hon. David G. Trager
United States Attorney
Eastern District of New York
(Att: Thomas R. Pattison)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-[illegible]inst- :

ZVONKO BUSIC, JULIENNE BUSIC, :
PETAR METANIC, FRANE PESUT and
MARK VLASIC, :

Defendants. :

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NOTICE OF MOTION FOR DISCOVERY AND A BILL OF PARTICULARS.

76 CR 602

SIRS:

PLEASE TAKE NOTICE, that the defendant JULIENNE BUSIC, by her attorneys DAVID RUDOLF, ESQ., and MICHAEL IRA ASEN, ESQ., and upon the annexed affidavit and all papers and proceedings heretofore had herein, will move this Court, before the HONORABLE JOHN R. BARTELS, in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, at a time and place to be fixed by the Court:

I.

For an order pursuant to Rule 16 of the Federal Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1963), requiring the government to disclose to the defendant JULIENNE BUSIC:

1. The nature of any electronic or photographic surveillance of the defendant conducted by the state or federal authorities and the date, time, location and manner of such surveillance.

2. The nature of any electronic or photographic surveillance of other persons, places, or organizations conducted by state or federal authorities which resulted in the interception and/or recording of any of the defendants conversations or photographs of the defendant and the date, time location and manner of such surveillance.

3. A copy of any and all tape recordings containing conversation by the defendant, including but not limited to a copy of the flight recorded tape and all tapes made of conversations between T.W.A. Flight 355 and persons outside the aircraft on September 10 and September 11, 1976.

4. Prints of any photographs, motion pictures, or still pictures of the defendant taken prior to, during or after the alleged hijacking which are within the custody or control of the government.

5. A photocopy of any search or arrest warrants issued in either state or federal court, as well as the supporting affidavits.

6. A description of any property or contraband seized from the defendant, her apartment, or an area under her control that the government intends to offer as evidence at trial, or which lead to any other evidence the government intends to use at trial, and the time, place, and manner of any such seizure.

7. A copy of any documents, books or papers which the government intends to introduce as evidence at trial.

8. The nature of any other physical evidence which the government intends to introduce as evidence at trial.

9. The nature of any expert or scientific tests and analyses performed by the government in connection with this case, including but not limited to fingerprint, handwriting, ballistic and chemical analyses, and a copy of the reports concerning such tests and analyses.

10. A photocopy of any and all reports and memorandums prepared by the New York City Police Department, the F.B.I., or any other governmental agency concerning the retrieval and detonation of the bomb recovered from Grand Central Station and the injuries received by Police Officer Brian Murray, Police Officer Henry Dworkin, Police Sgt. Terrence McTigue and Deputy Inspector Fritz Behr on September 11, 1976.

11. A copy of any written statement, confession or admission made by the defendant which is within the custody or control of the government, a copy of any reports or memorandum which purport to embody any oral statement, confession or admission made by the defendant, and the date, time, location and persons present when any such statement was made.

12. A copy of any statements, either oral or written, made by other persons, including the alleged co-conspirators, which the government intends to introduce against the defendant as an adoptive admission or a statement in furtherance of the conspiracy.

13. A copy of any statement, either oral or written, made by a co-defendant which tends to inculpate the defendant.

14. The names and addresses of all accomplices or co-conspirators not named in the indictment who are known to the government. If unknown at this time, it is hereby requested that the government provide such names and addresses in the future as they become known.

15. The names and addresses of all witnesses the government intends to call at trial.

16. The names and addresses of any other witnesses known by the government to have information regarding the crime charged in the indictment, including but not limited to the passengers and crew members aboard T.W.A. Flight 355 on September 10, 1976.

17. The nature of any pre-trial identification procedures conducted by the government or agents of the government, and the date, time, place and persons present at such procedure.

18. The nature of other criminal acts committed by the defendant which the government intends to introduce as evidence and the particulars of those acts, including but not limited to the time and place the acts were committed, whether the acts were the subject of court proceedings, and the result of those proceedings.

19. A photocopy of the defendant's criminal record.

20. Whether any informants or undercover agents were involved in the investigation or preparation of the case against the defendant.

21. Whether any consideration of any kind has been promised or given to any of the government's prospective witnesses in return for their cooperation or testimony and, if so, the nature of such consideration.

22. Any other information in the possession of the government which may tend to exonerate the defendant or to refute, impeach or contradict any of the evidence the government intends to introduce at trial, including but not limited to:

a) any and all statements taken by the state or federal government from all witnesses and co-defendants regarding the defendant JULIENNE BUSIC'S conduct and attitude on the plane during the hijacking.

b) any and all evidence which indicates that the defendant JULIENNE BUSIC was not present or did not participate in one or more of the overt acts which were allegedly committed in furtherance of the conspiracy.

II.

For an order pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure requiring the government to serve and file a bill of particulars setting forth:

AS TO COUNTS ONE AND TWO:

1. Whether it is alleged that the defendant, JULIENNE BUSIC was a principal or an aider and abettor in the crime charged.

2. If it is alleged that the defendant JULIENNE BUSIC was a principal:

a) the means and manner by which she threatened the use of force or violance, and

b) the means and manner by which she seized and exercised control of the aircraft.

3. If it is alleged that the defendant, JULIENNE BUSIC was an aider and abettor:

a) the manner in which she aided and abetted the commission of the aircraft piracy, and

b) the specific acts she engaged in which constituted such aiding and abetting.

4. The manner by which the seizure and exercise of control over the aircraft by the defendants resulted in the death of Police Officer Brian Murray.

5. Whether it is alleged that the defendant, JULIENNE BUSIC participated in any acts which caused the death of Police Officer Brian Murray and, if so:

a) the nature of her participation in preparing the instrumentality which caused the death, and

b) the nature of her participation in any other acts which caused the death.

6. The names of all persons, other than the defendants named in the indictment, whom the government will claim participated in any way in the crime charged in Counts One and Two.

AS TO COUNT THREE:

7. The time and place the conspiracy is alleged to have begun, and the names of the original co-conspirators.

8. The date that the defendant, JULIENNE BUSIC is alleged to have joined the conspiracy and the specific acts she is alleged to have committed in furtherance of the conspiracy.

9. A list of all overt acts, including meetings, not mentioned in the indictment which the government intends to prove were in furtherance of the alleged conspiracy and the dates, times and places such acts were committed.

10. The date that the first overt act in furtherance of the conspiracy was committed and the nature of that act, who performed it, and where it was performed.

11. The number of separate times, the dates dates thereof, and the places, if any, that the defendant, JULIENNE BUSIC, is alleged to have met or conversed with the named co-conspirators or unnamed co-conspirators.

12. Whether the government alleges that the defendant JULIENNE BUSIC knew of the contents of the letter set forth in overt act 2 prior to the time when it was allegedly handed to flight steward Thomas Van Dorn; if so, state the manner in which the government will claim such knowledge on the part of the defendant and state, also, those portions of the letter, if any, that the government will not claim that the defendant had knowledge.

13. Whether the defendant JULIENNE BUSIC is alleged to have participated in overt act 4 and, if so, the nature of her participation.

14. Whether the government alleges that the defendant JULIENNE BUSIC knew of the commission of overt act 4 and, if so, when and how it is alleged that the defendant acquired that knowledge.

15. The name or names of the persons who the government will allege committed overt act 4.

16. How many members of the alleged conspiracy or others knew, prior to its commission, of overt act 4. State their names.

17. Who the government alleges committed overt act 5.

18. Whether the defendant JULIENNE BUSIC is alleged to have participated in overt act 5 and, if so, the nature of her participation.

19. Whether the conspiracy had any other unlawful objects other than the object set forth in the indictment; that is, the agreement to commit air piracy.

20. Whether the government alleges that the conspirators agreed to commit murder to achieve the object of the conspiracy; if so, who among the named conspirators so agreed.

21. When the object of the conspiracy was attained or when the conspiracy was otherwise completed.

22. All places, other than the Eastern District of New York, in which the government will allege that the conspiracy operated and state the times thereof.

23. The names and addresses of any co-conspirators not named in the indictment.

24. Any other conspiracies which the government alleges were participated in by the defendant, JULIENNE BUSIC.

DATED: BROOKLYN, NEW YORK
November 9, 1976

Yours, etc.,

WILLIAM J. GALLAGHER, ESQ.,
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
26 Court Street, Room 701
Brooklyn, New York 11242

TO: DAVID G. TRAGER, ESQ.,
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-------------------------------X

UNITED STATES OF AMERICA, :

-against- :

ZVONKO BUSIC, JULIENNE BUSIC, :
PETAR METANIC, FRANK PESUT and
MARK VLASIC, :

Defendants. :

-------------------------------X

AFFIDAVIT IN SUPPORT OF MOTION FOR DISCOVERY AND A BILL OF PARTICULARS.

76 CR 602

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

DAVID S. RUDOLF, being duly sworn, deposes and says:

1. He is an attorney associated with WILLIAM J. GALLAGHER, ESQ., Federal Defender Services Unit/The Legal Aid Society, the attorney of record assigned under the Criminal Justice Act to represent the defendant herein, JULIENNE BUSIC.

2. This affidavit is submitted in support of the defendant's motion for discovery and a Bill of Particulars.

3. On September 30, 1976, counsel submitted a letter to Assistant United States Attorney Thomas Pattison requesting informal discovery. On November 3, 1976, counsel was notified that the government could provide some of the material requested. On November 5, 1976, counsel participated in an informal discovery conference with Mr. Pattison as required by Rule 3(e) of the Criminal Rules of the United States District Courts for the Eastern District of New York. The matters requested in this motion represent those items to which the government either could not or did not respond to.

4. Counsel respectfully joins in all motions for discovery and Bills of Particulars made on behalf of all codefendants and adopts the arguments contained therein.

WHEREFORE, it is respectfully requested that an order be entered granting the annexed motion for discovery and Bill of Particulars in all respects; and for such other and further relief as the Court may deem just and proper.

DAVID S. RUDOLF

Sworn to before me
this day of November, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-------------------------x

UNITED STATES OF AMERICA, :

-against- :

ZVONKO BUSIC, JULIENNE BUSIC, :
PETAR METANIC, FRANE PESUT and
MARK VLASIC, :

Defendants. :

-------------------------x

NOTICE OF MOTION TO SUPPRESS EVIDENCE

76 CR 602

SIRS:

PLEASE TAKE NOTICE, that the defendant JULIENNE BUSIC, by her attorneys DAVID RUDOLF, ESQ. AND MICHAEL IRA ASEN, ESQ, and upon the annexed affidavit and all papers and proceedings heretofore had herein, will move this Court, before the Honorable JOHN R. BARTELS, in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, at a time and place to be fixed by the Court, for an order pursuant to Rule 12(b)(3) and Rule 41(f) of the Federal Rules of Criminal Procedure suppressing (1) all statements made by the defendant JULIENNE BUSIC to any law enforcement official either in the United States or in France and (2) all physical evidence and documents seized from the defendant's person, her luggage, the Boeing 727 aircraft, or her apartment in New York; and for such other and further relief as the Court may deem just and proper.

DATED: BROOKLYN, NEW YORK
November 9, 1976.

Yours, etc.,

WILLIAM J. GALLAGHER, ESQ.,
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
26 Court Street, Room 701
Brooklyn, New York 11242

TO: DAVID G. TRAGER, ESQ.,
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------X

UNITED STATES OF AMERICA, :

-against- :

ZVONKO BUSIC, JULIENNE BUSIC, :
OETAR METANIC, FRANE PESUT
and MARK VLASIC, :

Defendants :

-----------------------------X

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

76 CR 602

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

DAVID S. RUDOLF, being duly sworn, deposes and says:

1. He is an attorney associated with WILLIAM J. GALLAGHER, ESQ., Federal Defender Services Unit/The Legal Aid Society, the attorney of record assigned under the Criminal Justice Act to represent the defendant herein, JULIENNE BUSIC.

2. This affidavit is submitted in support of the defendant's motion pursuant to Rule 12(b)(3) and Rule 41(f) of the Federal Rules of Criminal Procedure to suppress evidence. It is based upon conversations with the defendant and some discovery made available by the government.

3. On September 11, 1976, at approximately 11:30 p.m. Eastern Daylight Time, the defendant JULIENNE BUSIC was taken into custody by French Police in Paris. She was subsequently searched, photographed, fingerprinted and interrogated by French officials. No food or water was provided. After several hours of questioning, she was taken aboard a French plane for the flight back to the United States. On the plane both of her hands were manacled to the seats, thus

making it impossible to sleep. Also on board were approximately fifteen French police agents. The flight arrived in New York on Sunday, September 12, at approximately 3:00 p.m.

4. After arriving in New York under French custody, JULIENNE BUSIC was immediately arrested by agents of the F.B.I. pursuant to a warrant issued that same day, September 12, 1976, by United States District Court Judge Henry Bramwell. She was then transported to F.B.I. headquarters in New York, where she was again searched. After being informed of her rights, the defendant told the agents that she could not answer questions because she had not eaten or slept for 72 hours. She also stated that she was totally disoriented from the lack of sleep, and at one point almost fainted and had to be assisted in walking. Nevertheless, the defendant was questioned by Federal agents as well as by Assistant District Attorneys from New York and Bronx Counties and Sergeant Joseph Coffey of the New York City Police Department. She was also asked to execute a consent to search form which she did. The questioning was finally terminated when the defendant insisted that she would not answer further questions without an attorney. She and the other defendants were finally taken to Metropolitan Correctional Center at approximately 10:00 p.m. on Sunday, September 12. She was not arraigned before Magistrate A. Simon Chrein until Monday, September 13, at approximately 12:30 P.M.

5. Counsel respectfully requests that a hearing be held to determine the circumstances surrounding the questioning of the defendant JULIENNE BUSIC at F.B.I. headquarters in New York and the reason for the delay in arraignment. Counsel joins in all motions made on behalf of the co-defendants to suppress the statements elicited by the F.B.I. and adopts all arguments contained therein.

6. On September 30, 1976, counsel hand delivered a letter to the United States Attorneys office which requested, inter alia, the substance of all statements made by the defendant and the circumstances under which they were elicited as well as the nature of all physical evidence and documents which the government intended to introduce at trial, a description of how any such items were seized, and a copy of all search warrants. The government has not yet been able to comply with this request.

7. Counsel therefore respectfully reserves all other motions which may be appropriate under Rule 12(b)(3) of the Federal Rules of Criminal Procedure until such time as the government provides counsel with the information necessary to make such motions as already requested.

WHEREFORE, it is respectfully requested that an Order be granted suppressing any and all statements attributed to this defendant, any and all physical evidence seized, and any and all evidence derived therefrom; or, in the alternative, counsel respectfully requests that a hearing be held to determine the admissibility of this evidence, and for such other and further relief as this Court may deem just and proper.

DAVID S. RUDOLF

Sworn to before me this
day of November, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

------------------------------x

UNITED STATES OF AMERICA,
Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,
Defendants.

------------------------------x

76 Cr. 602 (JRB)

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavit and Memorandum of Points and Authorities in Support of Motion for Discovery and Bill of Particulars, and upon all papers and proceedings heretofore had herein, the undersigned will move this Court before the Honorable John R. Bartels in Courtroom 4 of the United States Courthouse, Brooklyn, New York, on a date to be fixed by the Court, or as soon as possible thereafter as counsel can be heard, for an order pursuant to Rules 7 and 16 of the Federal Rules of Criminal Procedure granting discovery and a bill of particulars as set forth in the annexed memorandum.

Respectfully submitted,

Dated: Washington, D.C.
November 10, 1976

Michael E. Tigar
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006
(202) 331-5085

OF COUNSEL:

Edward Bennett Williams
Richard M. Cooper
Pierce H. O'Donnell

TO: David G. Trager
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC, Defendants.	76 Cr. 602 (JRB) MEMORANDUM OF POINTS AND AUTHORITIES CONCERNING DISCOVERY AND PARTICULARS

Attached hereto and by this reference incorporated herein is an exchange of correspondence between defense counsel and Assistant United States Attorney Thomas Pattison concerning discovery and particulars.

Pursuant to F.R. Crim. P. 7 and 16, counsel requests that the government be directed to supply the items requested to which the government has not consented, as follows:

Discovery

1. The grand jury testimony of all witnesses who appeared, particularly those witnesses who are government agents or employees.

2. The memorandum made in connection with scientific reports and tests. The government has agreed to furnish the reports themselves.

3. The government has consented, hence no request is made under this item.

4. As we have substantial reason to believe that the Defendant Busic has been the subject of unlawful electronic,

visual, photographic, and other surveillance, please furnish all writings, recordings, and other evidance relating in any way to such surveillance. This request will require a search, by appropriate custodians of records, of files in many government agencies. The government has agreed to search only for records of electronic surveillance.

5. Consented to.

6. The name of every person who furnished information used in the preparation of an affidavit of Detective Santo Parola, Shield No. 2710, dated September 12, 1976.

7. Consented to.

8. All statements of persons who may reasonably be expected to be government witnesses. This information is requested both as discovery and in a bill of particulars.

9. Consented to.

10. The flight plan, flight log, flight recorder tape, and all other writings and recordings concerning the aircraft mentioned in the indictment and all other aircraft which accompanied it at any time during the period mentioned in the indictment. The government has agreed only to furnish such information relating to the aircraft mentioned in the indictment.

11. Consented to.

Particulars

1. With respect to Counts 1 and 2, state each and every location included within the term "elsewhere". The government's response is insufficient.

2. State the time and place at which the alleged "attempt" to commit air piracy took place. The government's response is insufficient.

3. Consented to.

4. State in haec verba what "threat[s] of force and violence," were made by any defendant.

5. Consented to.

6. State the manner in which "the commission of [the] offense resulted in the death of New York City Police Officer Brian Murray.

7. Consented to.

8. State whether or not any part of the alleged conspiratorial agreement was in writing, and, if so, set forth the contents of each such writing. The government has agreed only to provide the "demand" notes.

9. Consented to.

10. State the time and place of each meeting or encounter between or among any alleged conspirators or unindicted co-conspirators in furtherance of the conspiracy and during the pendency thereof.

11. Consented to, except that the government's response contains a typographical error.

12. State where within the Eastern District of New York the defendants committed the offense of conspiracy. The government has agreed only to inform us that LaGuardia Airport was one such location.

13. Set forth any overt acts not alleged in the indictment, whether or not known to the grand jury.

14. State, with respect to Overt Act No. 4, who placed the bomb in the locker.

15. State, with respect to Overt Act No. 5, who purchased the ticket.

16. Set forth the justification for the government's belief, if any such esits, that this is a capital case.

Given the complex nature of this case, and the disproportion between the investigative resources of the government and the defense, the discovery requests are essential to trial preparation. In addition to the authorities cited by counsel for other defendants, see Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States v. Anderson, 481 F.2d 685 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211 (1974); United States v. Richter, 480 F.2d 170 (9th Cir. 1973).

The particulars requested are called for by a number of federal cases.

The date, time and place of the acts alleged in the indictment is proper matter for a bill of particulars. United States v. Lopez, 26 F.R.D. 174 (S.D.N.Y. 1960); United States Baker Brush Co., 197 F. Supp. 922 (S.D.N.Y. 1961); United States v. Wilson, 20 F.R.D. 569 (S.D.N.Y. 1957).

Concerning the witnesses' names, it has been held:

> "Furthermore, it is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial." Will v. United States, 389 U.S. 90, 99 (1967).

There is substantial reason to believe that the persons whose names are sought by these requests are crucial to the trial of this case. Hence, United States v. Smith, 16 F.R.D. 372 (W.D. Mo. 1954) and the rule of United States v. Covelli, 210 F. Supp. 589 (N.D. Ill. 1962), and United States v. Willis, 33 F.R.D. 510 (S.D.N.Y. 1963); United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y. 1967); United States v. Anderson, 254 F. Supp. 177 (W.D. Ark. 1966), require disclosure.

Allegations that a bomb was placed, or a ticket purchased are meaningless unless a name is given, and the allegations placed in the active voice. Cf. United States v. Lubomski, 277 F. Supp. 713 (N.D. Ill. 1967); United States v. Baker, 262 F. Supp. 657, 674 (D.D.C. 1966); United States v. Lieberman, 15 F.R.D. 278 (S.D.N.Y. 1953). See also United States v. Van Allen, 28 F.R.D. 329 (S.D.N.Y. 1961).

Respectfully submitted,

Dated: Washington, D. C.
November 10, 1976

Michael E. Tigar
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006
(202) 331-5085

Of Counsel:

Edward Bennett Williams
Richard M. Cooper
Pierce H. O'Donnell

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JOHN W. VARDAMAN, JR.
PAUL MARTIN WOLFF
J. ALAN GALBRAITH
CHARLES H. WILSON
JOHN G. KESTER
WILLIAM E. MCDANIELS
MICHAEL E. TIGAR

FRANCIS J. GROSSI, JR.
BRENDAN V. SULLIVAN, JR.
AUBREY M. DANIEL III
RICHARD M. COOPER
ROBERT P. WATKINS
JERRY L. SHULMAN
JOHN B. KUHNS
ALLAN A. RYAN, JR.
PETER B. HAMILTON
CHARLES S. ROBB
WILLIAM W. GRAHAM
LAWRENCE LUCCHINO
BENJAMIN W. HEINEMAN, JR.
PIERCE H. O'DONNELL
LEWIS H. FERGUSON III
ROBERT B. BARNETT
KENORA E. HEYMANN
ANDREW L. LIPPS

October 26, 1976

BY HAND

Mr. Thomas R. Pattison
Assistant U. S. Attorney
Chief, General Crimes
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Dear Mr. Pattison:

Please make available to us the following discovery material:

No.

1. The grand jury testimony of all witnesses who appeared, particularly those witnesses who are government agents or employees.

Yes
[redacted]

2. A copy of all scientific reports, tests, and memoranda made in connection therewith, including all photographs and diagrams relating thereto. In addition, we request all available physical evidence used in connection with these tests. This request includes, but is not limited to, scientific tests and reports concerning the explosion of the device mentioned in the indictment, autopsies and medical reports on all persons claimed to have been injured or killed, and all flight recorder and navigational data concerning the aircraft in question.

? Comment of other Δs

3. All prior statements of all defendants. + pre arrest by govt.

4. As we have substantial reason to believe that the Defendant Busic has been the subject of unlawful electronic, visual, photographic, and other surveillance,

[illegible]

please furnish all writings, recordings, and other evidence relating in any way to such surveillance. This request will require a search, by appropriate custodians of records, of files in many government agencies.

5. All physical evidence seized from Apartment No. 6, 303 West 76th Street, New York, New York. OK

6. The name of every person who furnished information used in the preparation of an affidavit of Detective Santo Parola, Shield No. 2710, dated September 12, 1976. don't know

7. All relevant photographs in the government's possession. OK

8. All statements of persons who may reasonably be expected to be government witnesses. { 48 hrs before [illegible]

9. All relevant tape recordings. OK

10. The flight plan, flight log, flight recorder tape, and all other writings and recordings concerning the aircraft mentioned in the indictment and all other aircraft which accompanied it at any time during the period mentioned in the indictment. OK if [illegible]

11. All exculpatory evidence, including material potentially useful for impeachment of any witness, whether or not that witness is a co-defendant, who may be expected to testify in any manner inculpatory of the Defendant Busic. OK

Please provide the following particulars:

1. With respect to Counts 1 and 2, state each and every location included within the term "elsewhere". OK

2. State the time and place at which the alleged "attempt" to commit air piracy took place. OK

3. State the time and place it is alleged that the offense of air piracy was first completed. OK

4. State *in haec verba* what "threat[s] of force and violence," were made by any defendant.

~~[illegible]~~ will think

5. State where the note referred to in Overt Act 2 of Count 3 was "handed" to Thomas Van Dorn giving the precise latitude and longitude. think

6. State the manner in which "the commission of [the] offense resulted in the death of New York City Police Officer Brian Murray." think

7. State all federal judicial districts in which the offenses alleged were committed. yes

8. State whether or not any part of the alleged conspiratorial agreement was in writing, and, if so, set forth the contents of each such writing. think

9. State the name and address of each and every unindicted co-conspirator, whether known to the grand jury or not. OK

10. State the time and place of each meeting or encounter between or among any alleged conspirators or unindicted co-conspirators in furtherance of the conspiracy and during the pendency thereof. think

11. State the time and place at which and manner in which the alleged conspiracy was ended. No

12. State where within the Eastern District of New York the defendants committed the offense of conspiracy. think

13. Set forth any overt acts not alleged in the indictment, whether or not known to the grand jury. think

14. State, with respect to Overt Act No. 4, who placed the bomb in the locker. NO

15. State, with respect to Overt Act No. 5, who purchased the ticket. if they know think

16. Set forth the justification for the government's belief, if any such exists, that this is a capital case. No

These requests call for information and evidence within the possession of the government and which may by the exercise of due diligence come into its possession. These requests are continuing in nature.

Very truly yours,

Michael E. Tigar

MET/cnw

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

TRP:jb
F# 763,251

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

November 4, 1976

Michael E. Tigar, Esq.
Williams, Connolly & Califano
1000 Hill Building
Washington, D.C. 20006

Re: United States v. Busic, et al.
Docket No. 76 CR 602

Dear Mr. Tigar:

The following is in response to your requests for discovery, inspection and particulars as contained in your letter of October 26, 1976, numerical as per your letter.

1) The Government will not comply with this request.

2) Enclosed please find copies of the following Federal Bureau of Investigation laboratory reports:

   a) One report referring to the receipt of items as listed, identified by laboratory number D-760913068 QC

   b) One laboratory report dated October 22, 1976

   c) One laboratory report dated October 1, 1976

   d) One report of the Identification Division dated September 23, 1976 (Chicago office request)

   e) One report of the Identification Division dated September 23, 1976 (New York office request)

f) One report of the Identification Division dated September 22, 1976

g) One report of the Identification Division dated September 21, 1976

As additional scientific reports are received they will be forwarded to you. You should also be alerted to the fact that additional materials may be in the custody of New York City authorities and, to save time, direct contact with those authorities may expedite your receipt of same.

3) In our meeting of October 27th, you were furnished with pages 76 - 86 inclusive of a Federal Bureau of Investigation report, which pages contained statements made by your client, the defendant Zvonko Busic. In addition, please find enclosed a rough transcript of a tape recorded interview of the defendant Busic, recorded on September 13, 1976. As you requested in our meeting, a copy of the tape recording will be mailed to you under separate cover. In addition, it is our understanding that Mr. Busic made statements to representatives of the New York County District Attorneys' Office. As soon as this material comes into our possession, we will furnish it to you. (See advice in item #2 above).

Enclosed please find statements made to the Federal Bureau of Investigation by co-defendants Julienne Busic, Petar Matanic, Mark Vlasic and Franc Pesut.

4) In response to your request concerning "unlawful electronic, visual, photographic and other surveillance," we have caused a search to be undertaken to ascertain whether or not your client was the subject of electronic surveillance by any Government agency. Insofar as your request goes beyond electronic surveillance, we are unable to comply with your request as stated.

5) A list of items seized will be provided. As these items come into the Government's possession they will be made available for your inspection. It is our understanding that these items were seized pursuant to a New York City search warrant and repeat the advice in item #2 above.

6) The Government will not comply with this request.

7) The Government will forward under separate cover copies of all relevant photographs.

8) The Government will not comply with this request.

9) The Government will ~~forward under separate cover,~~ make available copies of all relevant tape recordings.

10) The Government will comply with this request, insofar as it relates to the aircraft mentioned in the indictment.

11) The Government recognize its continuing obligation to provide exculpatory material. At the present time the Government is in possession of no such material.

Particulars:

1) The approximate locations included within the term "elsewhere" are as follows: New York County, New York, Bronx County, New York, New Jersey, Upper New York State, Montreal, Canada, Gander, Newfoundland, Keflavik, Iceland, London England, Paris, France and points along the air route between the above areas.

2) The attempt occured in various places and for a relatively lengthy period, both aboard the aircraft and prior to its departure. Further particulars will not be forwarded at this time.

3) The offense of air piracy was completed in Paris, France sometime on the morning of Sunday, September 12, 1976.

4) The Government declines to answer this request for particulars on the grounds that it calls for material which is evidentiary in nature.

5) The Government is unable to answer this request for particulars with exactitude. The note was handed to Thomas Van Dorn at approximately two to six minutes before the aircraft reached a point approximately 20 miles east of Buffalo, New York.

6) The Government declines to answer the request on the grounds that it calls for material which is evidentiary in nature.

7) The offenses were committed in the following districts: Eastern District of New York, Southern District of New York, Northern District of New York and Western District of New York. It is possible that evidence will be discovered which may indicate additional districts as having been the sites of offenses. If so, the Government will disclose such additional districts.

8) The Government declines to answer such request as calling for material which is evidentiary in nature, except insofar as the request may envision the "demand" notes as being written evidence of the conspiratorial agreement. Copies of these notes are enclosed.

9) At the present time the Government is unaware of any unindicted co-conspirators. Since the investigation is continuing, however, the Government will disclose the existence of any such persons who may be characterized as such when and if their identifies become known.

10) The Government declines to answer on the grounds that the request calls for material which is evidentiary in nature.

11) The conspiracy as alleged in the indictment ended in Paris, France during the morning hours of Sunday, September 13, 1976 and was effected by the surrender of the defendants.

12) Overt acts in furtherance of the conspiracy were committed at LaGuardia Airport, Queens, New York, among other places, as noted in the indictment. The Government declines to furnish any other particulars.

13) The Government declines to answer this request.

14) The Government declines to answer this request.

15) The Government declines to answer this request.

16) The Government declines to answer this request.

Very truly yours,

DAVID G. TRAGER
United States Attorney

Thomas R. Pattison
Chief, General Crimes

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC, Defendants.	76 Cr. 602 (JRB) AFFIDAVIT OF SERVICE

The undersigned, being duly sworn, deposes and says:

1. I am over the age of eighteen years, and not a party to this action.

2. On November 10, 1976, I served the following papers: Notice of Motion, Affidavit and Memorandum of Points and Authorities in Support of Motion for Discovery and Bill of Particulars.

3. Service was effected by depositing a copy of each paper, first-class postage fully prepaid, in the United States mails at Washington, D. C., addressed as follows:

Thomas R. Pattison
Assistant U. S. Attorney
Chief, General Crimes
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Nancy Rosner
401 Broadway
New York, New York

Martin Elefant
16 Court Street
Brooklyn, New York 11242

LAW OFFICES
WILLIAMS, CONNOLLY
& CALIFANO
[illegible] HILL BUILDING
WASHINGTON, D.C. 20006
—
AREA CODE 202
331-5000

Irwin Rochman
230 Park Avenue
New York, New York 10017

David Rudolf
26 Court Street
Suite 701
Brooklyn, New York 11242

MICHAEL E. TIGAR

Subscribed and sworn to before me this ____ day of November, 1976.

Notary Public

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ NOV 22 1976 ★
TIME ~~A.M.~~ 4:06 P.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,
and MARC VLASIC,
Defendants.

76-CR-602

Appearances:

DAVID G. TRAGER, ESQ.
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Eastern District of New York
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EDWARD R. KORMAN, ESQ.
THOMAS R. PATTISON, ESQ.
BARRY E. SCHULMAN, ESQ.
Assistant U.S. Attorneys
Of Counsel

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MICHAEL E. TIGAR, ESQ.
PIERCE O'DONNELL, ESQ.
Of Counsel

WILLIAM J. GALLAGHER, ESQ.
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and
MARTIN ELEFANT, ESQ.
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Attorneys for Defendant Petar Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Frane Pesut
230 Park Avenue
New York, N.Y. 10017

MARTIN OZER, ESQ.
5 Dogwood Road
Great Neck, N.Y. 11024
Also on behalf of defendants

BARTELS, District Judge

The defendant Zvonko Busic moves for an order of severance pursuant to Rule 14, Fed.R.Cr.P., to protect the record though he is not certain that severance is necessary because discovery is incomplete. The basis for this motion is the possibility of prejudice arising from the introduction at a joint trial of co-defendants' statements that may inculpate this and other defendants in violation of Bruton

v. United States, 391 U.S. 123 (1968).

The other defendants move for an order of severance under Rule 14 on the ground that Zvonko Busic is willing to give exculpatory testimony as to them at a separate trial, whereas defendants would be precluded from calling him to testify at a joint trial. No affidavits have been offered by Busic or his counsel as to Busic's willingness to testify at a separate trial. Under the procedure suggested by defendants it would be necessary to try Busic first unless he would be willing to waive his Fifth Amendment privilege. See United States v. Echeles, 352 F.2d 892 (7th Cir. 1965).

Under Rule 8, Fed.R.Cr.P., there may be a joinder of defendants if they are alleged to have participated in the same transaction and in such a case they may be tried together. Rule 14 permits relief by way of severance if a defendant can establish prejudice by a joinder with other defendants. In moving for a severance, however, the burden is upon the defendant to establish that he will be so prejudiced by a joint trial that he will be unable to obtain a fair trial unless his case is severed. United States v. Perez, 489 F.2d 51 (5th Cir. 1973). The defendants have not met this burden.

The general rule is that defendants accused of jointly participating in a conspiracy or in a substantive offense should be tried together unless they come forward with facts demonstrating that a joint trial would deny them a fair trial. A compelling consideration is whether joinder would serve the purposes of judicial and trial economy and convenience of [illegible] of two trials without denying defendants a fair trial. [illegible]hat v. United States, 404 F.2d [illegible] ([illegible] 1968), cert. denied, 394 U.S. 909 (1969); United States v. [illegible], 441 F.2d 114 (2d Cir.), cert. denied, [illegible] U.S. 912 (1971).

[illegible] the defendant Zvonko Busic's motion [illegible] we find that the Government has not at present asserted that it will offer in evidence any statements of other co-defendants which would inculpate Busic, nor does it appear that if such statements were offered they could not be effectively redacted to satisfy the demands of Bruton.

Referring to the motions of the other defendants, it is obvious that they have failed to satisfy their burden of proof. Indeed, there is no reason to believe that proper instructions from the Court would not eliminate any claimed prejudice these defendants might suffer by a joint trial. It also should be noted that the statements made by Busic have implicated all of the defendants and it is difficult to understand how a separate trial would be of any help to them. Consequently, all motions for a severance are hereby denied.

SO ORDERED.

Dated: Brooklyn, N.Y.,
November 22, 1976.

John R. Bartels
United States District Judge

TRP:sm
F. # 763,251

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNIT[illegible] STATES OF AMERICA

[illegible] against -

[illegible] SIC, et al.,

Defendants.

- - - - - - - - - - - - - - - - X

GOVERNMENT'S RESPONSE TO DEFENDANT'S BUSIC'S MOTION FOR DISCOVERY AND INSPECTION AND BILL OF PARTICULARS

The following is in response to the defendant ZVONKO BUSIC'S motion for discovery and inspection and bill of particulars. Sequential numbering is as per defendant's motion papers.

1) The Government opposes this request for Grand Jury minutes, except insofar as they will be produced pursuant to 18 U.S.C. 3500. Defendant cites no authority for this request and there is no showing of particularized need.

2) The Government is unclear as to the nature of this request. If the request envisions internal memoranda prepared by the Government attorneys, the Government opposes this request. If the request is directed to memoranda prepared by the laboratory technicians in addition to reports, the Government does not oppose the request, but knows of no such documents. The reports themselves have been furnished, and any additional reports will be furnished as they become available.

3) The Government does not oppose this request.

4) As the request indicated, a search has been initiated for electronic surveillance material. No authority has been cited requiring a search for "visual, photographic and other surveillance".

5) As the Government has indicated, it does not possess these items. They are presently in the custody and control

of the New York City Police Department. When and if they become available to the Government, they will be made available for the defendant's inspection.

6) The Government opposes this request.

7) All relevant photographs are available for your inspection. Copies will be made of those photographs which the Government intends to offer into evidence and those copies will be furnished to you.

8) The Government opposes this request. The legislative history of Rule 16 of the Federal Rules of Criminal Procedure indicates that Congress specifically excluded a requirement for the premature disclosure of witnesses. The cases cited by counsel all precede this clear expression of legislative intent. It should be pointed out that the Government will disclose the names of its witnesses three days before trial in accordance with 18 U.S.C. 3432.

9) The Government does not oppose this request.

10) The Government opposes this request insofar as it encompasses aircraft other than that aircraft which is the subject of this indictment. The Government assumes that the request is directed to the TWA 707 which accompanied the subject aircraft from Gander, Newfoundland to Paris, France and also certain French Mirage jets which escorted the subject aircraft over France. The Government's position is that; 1) The relevancy of such material is questionable and, 2) the Government is not in possession of the material requested and declines to undertake the time-consuming process of obtaining it, especially with regard to foreign (probably military) aircraft. The Government does not intend to offer these items into

evidence. The defendant is free, of course, to obtain this material if he so desires, but the Government should not be required to devote its' resources to obtaining it for him under these circumstances.

11) The Government is aware of its obligation and will comply with this request.

Particulars

At the outset, it must be noted that the purpose of a bill of particulars is to apprise the defendant of the essential facts of the crime with which he is charged; it is not an investigative vehicle for the defense. United States v. Salazar, 485 F.2d 1272 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974). Moreover, an inquiry into the Government's legal theory is not a proper purpose for a bill of particulars. United States v. Verra, 203 F. Supp. 87, 92 (S.D.N,Y. 1962).

With the above principles in mind, the Government's response to the defendants demands for particulars is as follows:

1) The Government's response (attached to defendant's moving papers) is sufficient.

2) The Government's affidavit on the issue of venue, coupled with the statement of the offense in the indictment, provide a sufficient response to this request in giving the approximate locations of the attempt. As is apparent from the above material, the attempt began on September 10, 1976.

3) This information has been furnished to the defendant.

4) The demand notes, which have been furnished, the statements of the defendants themselves, which have also been furnished, and the indictment, sufficiently apprise the defendants of the nature of the threats of force and violence employed

in this offense. To the extent that the defendants generally corroborated these threats during the course of the offense in oral statements to passengers and crew aboard the plane, such material is not the proper subject matter for a bill of particulars.

5) The Government at this time amends its prior response. Based on the latest information available to the Government it now appears that the note was handed to Mr. Van Dorn approximately two to six minutes prior to the plane being at a point some 50 miles west north west of Elmira, New York. The Government's investigation on this point is continuing, and further information may alter the above. You shall be kept informed of progress in this area.

6) The proof at trial will show that Officer Murray's death was caused by the explosion of the bomb placed in the locker at Grand Central Station, which placement was a part of this offense. The autopsy report has been furnished.

7) The Government has responded to this request.

8) The Government's response to this request is sufficient. To the extent that the request envisions a contractual agreement among the defendants embodying the conspiracy, the Government knows of no such document. To the extent that any document relating to the conspiracy in any way may be deemed to be a "part of the alleged conspiratorial agreement", the Government respectfully declines to unduly restrict its proof of trial by attempting to respond to this request.

9) The Government has responded to this request.

10) The Government opposes this request on the grounds that it calls for material purely evidentiary in nature.

11) The Government has responded to this request.

12) The indictment and materials previously provided are sufficient to apprise the defendant of the nature of the offense charged. In light of the fact that conspiracy, by its very nature, is a continuing offense, an attempt to answer this request with precision would only serve to unduly limit the Government's proof at trial and not materially clarify any misunderstanding, if any could exist as to the nature of the charges herein involved.

13) The Government opposes this request. (see United States v. Ianelli, 53 FRD 482 (S.D.N.Y. 1971).

14) At the present time, the Government believes that the defendant Zvonko Busic placed the bomb in the locker. Whether he was alone or accompanied by anyone else is unknown at this time.

15) At the present time, the Government believes that the defendant Zvonko Busic purchased the ticket.

16) The Government opposes the request as being beyond the scope of a bill of particulars.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

By: ______________________________
THOMAS R. PATTISON
Assistant United States Attorney

28) See 27 above

29) At the present time the Government believes Zvonko Busic committed overt act 5, although investigation is continuing on this matter.

30) The Government does not allege "S. Rodic" to be anyone.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

By: Tho R Pattison

THOMAS R. PATTISON
Assistant United States Attorney

TRP:mb
P#763,251

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

ZVONKO BUSIC,
PETAR MATANIC,
JULIENNE BUSIC,
MARK VLASIC and
FRANE PESUT.

Defendants.

- - - - - - - - - - - - - - - - - X

76 CR 602

GOVERNMENT'S RESPONSE
TO DEFENDANT MATANIC'S
MOTION FOR DISCOVERY AND
INSPECTION AND BILL OF
PARTICULAR

The following is in response to the defendant Matanic's omnibus motion for discovery and inspection and bill of particulars. Sequential numbering is as per defendant's motion papers.

1a) At the present time the Government does not intend to offer any real evidence seized from the person or residence of defendant Matanic. Nevertheless, the Government consents to furnish copies of personal effects seized from the defendant Matanic at the time of his arrest.

The Government opposes the request for a listing of all real evidence which will be offered into evidence against the defendant Matanic, but will consent to allow inspection of same prior to trial.

b) & c) The Government consents to this request insofar as it relates to post-arrest statements of the defendant Matanic and all co-defendants. Insofar as the request envisions the disclosure of pre-arrest statements made to non-government agent witnesses, the Government will disclose the material in accordance with 18 U.S.C. 3500.

d) The Government consents to this request.

e) The Government opposes this request as being beyond the provisions of Rule 12(d)(2) and 16 of the Federal Rules of Criminal Procedure.

f) The Government opposes this request at this time. If the Government does offer evidence of prior or subsequent acts or crimes, it will make an offer of proof prior to the tender of such evidence.

g) The Government is unaware of any photographic spreads used to affect eyewitness identification of the defendant Matanic. Material dealing with a lineup conducted by the New York County District Attorney's Office is not now in the custody, or control of the Government. It should be pointed out that Mr. Bergman and Mr. Elefant are presently co-counsel for Mr. Matanic in the case entitled "People of the State of New York v. Petar Matanic et al." and, as such, would presumably have access to this material.

RULE 16

2. Copies of post-arrest statements of all defendants have been furnished, to the extent that they are in the possession of the Government. Since reports of local law enforcement authorities, (specifically the N.Y. County District Attorney's Office and the New York City Police Department), are not in the Government's control or custody, we repeat the advice contained in (g) above.

The "pedigree" sheets referred to in the request are presumably those filed at the time of the defendant's preliminary examination before the U.S. Magistrate and, as such, are in the public record.

3. To the extent that the request encompasses pre-arrest statements made to non-government agent witnesses, they will be disclosed as per 18 U.S.C. 3500.

4. At the present time the Government is unaware of the existence of any prior criminal record of defendant Matanic.

The Government will supply copies of co-defendant's criminal records.

5. The Government will allow inspection of all physical evidence which it intends to offer into evidence at trial, and/or which were seized from the defendant Matanic.

(a) (See (5) above)

(b) The Government will allow inspection of these items.

(c) The Government opposes this request upon the grounds that; (1) there is an insufficient showing of materiality to the preparation of the defense and (2) disclosure is not in the public interest.

(d & e) The Government opposes these requests on the grounds that there is an insufficient showing of materiality to the preparation of the defense.

6. The Government has furnished those scientific reports which it has received to date, and has also furnished the autopsy report relating to Police Officer Brian Murray. The Government also consents to furnishing the curriculum vitae or resumé of any expert witness that the Government intends to call in its case in chief. The Government opposes the request calling for the production of names of "persons responsible for supervising, manning and operating the anti-hijack equipment in operation at the TWA terminal at LaGuardia Airport for TWA flight 355 on September 10, 1976". The defendant makes no showing as to how this material is disclosable under Rule 16, F.R.Cr. Proc., nor how it is material to the defense.

7) The Government opposes this request. The defendant has cited no authority authorizing such a request.

8) The Government will provide a list of its prospective witnesses pursuant to 18 U.S.C. 3432.

9) The Government opposes this request.

10) The Government will comply with this request.

11) While the Government is aware of its continuing obligation to provide exculpatory material and will of course comply therewith, it is the Government's position that "copies of all New York City Police Department regulations, instructional books, manuals, and the like relating to the dismantling or detonation of explosive devices" do not fall within the definition of exculpatory material. In any event, such material is not within the custody or control of the Government.

Government's response to defendant Matanic's motion for bill of particulars.

1) While the Government opposes this as calling for matter purely evidentiary in nature, it should be pointed out that the indictment sufficiently apprises the defendants of the means and manner by which the defendants threatened the use of force and violence, i.e., by the display of devices alleged to be bombs, by the placing of, and causing the discovery of, a live bomb in Grand Central Station, by causing authorities to believe that a second bomb had been placed and by pretending to have a handgun aboard the plane. While the above is not meant to be an exclusive cataloging of all means used, any further details would unduly limit the Government's proof at trial and be superfluous to the need for understanding the nature of the charge and to prepare a defense.

2) As in (1) above, the Government's position is that the indictment clearly sets forth the means used to seize and exercise control of the plane, and any further particulars are unnecessary, and would involve evidentiary matter.

3) The Government is under no obligation to disclose its' legal theory.

4) The term "special aircraft jurisdiction" as used in the indictment has a meaning consistent with that terms' general meaning as outlined in the 1970 amendment (Pub. L. 91-449). See 1970 U.S. Code Cong. and Adm. News, p. 3996. The Government declines to furnish any other particulars,

5) The crime alleged in Count one began at approximately 8:45 A.M., September 10, 1976 and continued until sometime in the morning of September 12, 1976.

6) The Government is unable to comply with this request with particularity. As a general proposition, the aircraft was, during commission of the crime, at Queens, New York, and thence, from Queens traveled over various portions of New York City, New Jersey, Pennsylvania, New York State, Canada, (Montreal), Gander, Newfoundland, over the Atlantic to Keflavik, Iceland, over the Atlantic, and thence over London, England, and over various portions of France, finally coming to rest at Charles DeGaulle Airport, in Paris, France. The Government contends that the above particulars are sufficient, given the purpose of a bill of particulars.

7) The Government declines to furnish the information sought on the grounds that that information is not the proper subject matter for a bill of particulars.

8) Officer Brian Murray's death resulted from the explosion of a bomb placed in a locker at Grand Central Station, New York, the placement of which bomb was a part of the offense of air piracy.

9) The Government opposes this request as being beyond the scope of a bill of particulars.

10) Photographs of the bomb placed in the locker at Grand Central Station are available for inspection. According to information now available to the Government, the bomb was placed in the locker at approximately 8:45 A.M. on September 10, 1976.

11) The Government's position is that the indictment sufficiently answers the request for particulars. Insofar as requests 11a) and b) are concerned, the Government refuses to furnish this information on the grounds that the questions, as phrased, are ambiguous and capable of varying interpretations, and as such, any attempt to answer would unduly restrict the Government's proof at trial.

12) The request as phrased is, again, ambiguous. In any event, names of witnesses shall be provided in accordance with 18 U.S.C. 3432.

13) See above responses to demands 1 through 7.

14) The objectives of the conspiracy as stated in the indictment were attained and the conspiracy was completed on approximately September 12, 1976.

15) At the present time the Government believes that the objectives of the conspiracy were as stated in the indictment. It should be noted, however, that the investigation is continuing and other objectives may be discovered.

16) The Government refuses to answer this request which calls for matters beyond the scope of a bill of particulars.

17) At the present time the Government does not allege that the defendant Matanic participated in any other conspiracies.

18) At the present time the Government is unaware of any other unnamed co-conspirators.

19) The Government refuses to respond to this request on the grounds that it calls for material purely evidentiary in nature.

20) Southern District of New York, Northern District of New York, Western District of New York, District of New Jersey, Middle District of Pennsylvania, District of Connecticut, Canada, Iceland, England, France and points over the ocean enroute to the above locations. As the indictment makes clear, the conspiracy began approximately September 6, 1976 and continued through the 12th of September, 1976. Further details are purely evidentiary.

21) The Government refuses to respond to this request as calling for evidentiary matters.

22) The Government does have certain information tending to show that the conspiracy existed prior to September 6, 1976. The Government will inform counsel by way of amended bill of particulars when this information is complete.

23) The Government refuses to respond to this request on the grounds that 1) it calls for matters which are evidentiary and 2) it is irrelevant to the issues involved in the case.

24) Yes

25) The Government is, at the present time, unaware as to whether or not the defendant Matanic aided and abetted in the placement of the bomb.

26) The Government refuses to respond to the request on grounds that it is beyond the scope of a bill of particulars and calls for evidentiary matters.

27) The Government is not yet certain as to particulars of the placement of the bomb, although at the present time the Government believes Zvonko Busic placed the bomb in the locker, either alone or with others.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC,
Defendants.

76 Cr. 602 (JRB)

REQUEST FOR VENIRE DE MEDIATATE LINGUAE

Defendant Zvonko Busic hereby requests the summoning of a venire including sufficient Croatians to permit the selection of a petit jury half of whose members are Croatian, also known as a jury de mediatate linguae pursuant to the provisions of the statute 28 Edw. 3, c. 13, made applicable to the proceedings of this Court by article 3, section 2 and the Sixth Amendment to the Constitution. The basis for this request is more fully set forth in the attached memorandum of points and authorities.

Dated: Washington, D. C.
February 16, 1977

Respectfully submitted,

Michael E. Tigar
WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5085

Of Counsel:

Edward Bennett Williams
Pierce O'Donnell

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC,
Defendants.

76 Cr. 602 (JRB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST FOR VENIRE DE MEDIATATE LINGUAE

The right of trial by jury in criminal cases, as guaranteed at two places in the Constitution, has often been held to include at least the most important elements of jury trial that existed at common law. The right of jury trial itself has been described by Justice Story as "part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." 2 J. Story, Commentary on the Constitution of the United States, § 1779. The common law has been looked to repeatedly by the Supreme Court in defining the nature of constitutional jury trial. See, *e.g.*, *Singer* v. *United States*, 380 U.S. 24 (1965) (waiver of jury trial); *District of Columbia* v. *Colts*, 282 U.S. 63 (1930) (jury trial for serious offenses); *Bloom* v. *Illinois*, 391 U.S. 194 (1968) (jury trial in comtempt cases). At common law, by the statute of 28 Edw. 3, c. 13, an alien was entitled to a jury half of whose members were his countrymen. See, 4 Blackstone, *Commentaries* 346 This right was a part of trial by jury as it existed when the Constitution was adopted and later when the Bill of Rights was added. The provision for a jury *de mediatate linguae* was applied to one of the earliest reported cases following America's independence from England. Respublica v. Mesca, 1 Dall (1 U.S.) 73, 1 L.Ed. 42 (1793). A jury de mediatate linguae was allowed by Chief Justice Marshall in United States v. Cartacho, 25 Fed. Cas. 312 (C.C.D. Va. 1823)(No. 14,738). The continued vitality of the jury de mediatate linguae is evidenced by, for example, Hollingsworth v. Duane, 12 Fed. Cas. 370, 371-72 (C.C.E.D. Pa. 1801)(No. 6,618) and Magill v. Brown, 16 Fed. Cas. 408, 417 (C.C.E.D. Pa. 1833)(No. 8,952).

Defendants frankly acknowledge that the dictum in United States v. Wood, 299 U.S. 123, 145 (1937), might be cited in opposition, for the Court speaks of the jury de mediatate linguae as having fallen into disuse. The only basis for such a statement, however, is the statutory provision, now codified as 28 U.S.C. § 1865(b)(1). This provision is not an absolute disqualification of aliens for jury service. To the extent that it may be argued to disqualify aliens from jury service it is unconstitutional. In re Griffiths, 413 U.S. 717 (1973).

Dated: Washington, D.C.
February 16, 1977

Respectfully submitted,

Michael E. Tigar
WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5075

Of Counsel:

Edward Bennett Williams
Pierce O'Donnell

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--------------------------------x

UNITED STATES OF AMERICA,
Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC,
Defendants.

--------------------------------x

76 Cr. 602 (JRB)

AFFIDAVIT OF SERVICE

MICHAEL E. TIGAR, being duly sworn, deposes and says:

1. I am over the age of eighteen years, and not a party to this action.

2. On February 17, 1977, I served the following papers: Request for Venire de Mediatate Linguae and memorandum of points and authorities in support.

3. Service was effected by depositing a copy of each paper, first-class postage fully prepaid, in the United States mails at Washington, D. C., addressed as follows:

Peter Schlam, Esq.
Assistant United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

David Rudolf, Esq.
26 Court Street, Suite 701
Brooklyn, New York 11242

Martin Elefant, Esq.
16 Court Street
Brooklyn, New York 11242

Paul Bergman, Esq.
25 Broadway
New York, New York 10004

LAW OFFICES
WILLIAMS & CONNOLLY
1000 HILL BUILDING
WASHINGTON, D.C. 20006

AREA CODE 202
331-5000

Nancy Rosner, Esq.
401 Broadway
New York, New York 10013

Irwin Rochman, Esq.
230 Park Avenue
New York, New York 10017

Michael E. Tigar

Subscribed and sworn to before me this 17th day of February, 1977.

Notary Public
My Commission Expires September 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------------------------------x

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,

Defendants.

----------------------------------x

76 Cr. 602 (JRB)

DEFENDANT ZVONKO BUSIC'S
NOTICE OF DEFENSE BASED
UPON MENTAL CONDITION.

Defendant Zvonko Busic, by undersigned counsel, hereby gives notice, pursuant to Rule 12.2 of the Federal Rules of Criminal Procedure, that he intends to rely upon a defense based upon mental condition and that he intends to introduce expert testimony relating to a mental condition. It is only within the past week that the results of research and psychiatric examination have been received by counsel for the defendant. The process of pretrial preparation of a defense based upon mental condition has been retarded by the fact that the defendant has not been granted bail and the attendant delays and inconveniences stemming from his incarceration.

Respectfully submitted,

Dated: Washington, D. C.
February 23, 1977

Michael E. Tigar
WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5085
Attorney for Zvonko Busic.

Of Counsel:

Edward Bennett Williams
Pierce O'Donnell

LAW OFFICES
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1000 HILL BUILDING
WASHINGTON, D.C. 20006

AREA CODE 202
331-5000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------------------------------x

UNITED STATES OF AMERICA, :
Plaintiff, :
v. : 76 Cr. 602 (JRB)
ZVONKO BUSIC, JULIENNE BUSIC, : AFFIDAVIT OF SERVICE
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,
Defendants. :

----------------------------------x

MICHAEL E. TIGAR, being duly sworn, deposes and says:

1. I am over the age of eighteen years, and not a party to this action.

2. On February 23, 1977, I served the following paper: Defendant Zvonko Busic's Notice of Defense Based Upon Mental Condition.

3. Service was effected by depositing a copy of each paper, first-class postage fully prepaid, in the United States mails at Washington, D. C., addressed as follows:

Peter Schlam, Esq.
Assistant United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

David Rudolf, Esq.
26 Court Street, Suite 701
Brooklyn, New York 11242

Martin Elefant, Esq.
16 Court Street
Brooklyn, New York 11242

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Nancy Rosner, Esq.
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Irwin Rochman, Esq.
230 Park Avenue
New York, New York 10017

MICHAEL E. TIGAR

Subscribed to before me this 23rd day of February, 1977.

Notary Public

My Commission Expires July 31, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,
Defendants.

76 Cr. 602 (JRB)

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed Memorandum of Points and Authorities in Support of Defendant Zvonko Busic's Motion to Dismiss Count One for Lack of Jurisdiction and Failure to Charge an Offense, and upon all papers and proceedings heretofore had herein, the undersigned will move this Court before the Honorable John R. Bartels in Courtroom 4 of the United States Courthouse, Brooklyn, New York, on a date to be fixed by the Court, or as soon as possible thereafter as counsel can be heard, for an order pursuant to Rule 12 of the Federal Rules of Criminal Procedure dismissing Count One of the indictment for lack of jurisdiction and failure to charge a violation of 49 U.S.C. § 1472(i)(B).

Dated: Washington, D. C.
February 23, 1977

Respectfully submitted,

Michael E. Tigar
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1000 Hill Building
Washington, D. C. 20006
(202) 331-5085

Attorneys for Zvonko Busic.

Of counsel:

Edward Bennett Williams
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC,

Defendants.

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76 Cr. 602 (JRB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ZVONKO BUSIC'S MOTION TO DISMISS COUNT ONE FOR LACK OF JURISDICTION AND FAILURE TO CHARGE AN OFFENSE

INTRODUCTION

Defendant Zvonko Busic, by undersigned counsel, has moved, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, to dismiss Count One of the indictment on the ground that the Court lacks jurisdiction and that Count One does not allege a violation of 49 U.S.C. § 1472(i)(B). This memorandum of points and authorities is submitted in support of the motion to dismiss. We demonstrate below that, based on the definition of the offense charged and the facts alleged in Count One, defendant cannot be prosecuted for the death of New York City police officer Brian J. Murray.

ARGUMENT

Count One of the indictment alleges as follows:

> "On or about the 10th and 11th days of September, 1976, within the Eastern District of New York and elsewhere, the defendants, ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC, attempted to commit and did commit air piracy as defined in 49 United States Code, Section 1472(i)(2), in that the defendants, ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC, by threat of force and violence and with wrongful intent did attempt to and did seize and exercise control of an aircraft within the special aircraft jurisdiction of the United States, to wit: a Boeing 727 known as Trans World Airlines Flight 355 bound from LaGuardia Airport, Queens, New York and enroute to O'Hare

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> Airport, Chicago, Illinois, the commission of which offense resulted in the death of New York City Police Office Brian Murray. (Title 49, United States Code, Section 1472(i); Title 19, United States Code, Section 2)."

For purpose of determining the motion to dismiss, we will assume that defendant Zvonko Busic, as charged in Count One, did seize and control the aircraft with the requisite intent and in the requisite manner. We will further assume that Officer Brian Murray was killed by the explosion of a bomb in Bronx County, New York, as he attempted to deactivate it.[1/]

The fundamental legal question to be resolved is whether the death of Officer Brian Murray, by the terms of 49 U.S.C. § 1472(i) and the language of the indictment tracking that provision, "result[ed] from the commission or attempted commission of the offense . . . ."[2/] We respectfully submit that, in light

---

[1/] In his request for a bill of particulars, defendant Zvonko Busic has requested that the government:

> "6. State the manner in which 'the commission of [the] offense resulted in the death of New York City Police Officer Brian Murray.'"

In light of the government's failure to answer this request, defendant has moved for an order granting a bill of particulars.

In its brief in the Second Circuit on appeal from this Court's dismissal of the first two counts of the indictment, the government stated that the "explosion of the bomb resulted in the death of New York City Police Officer Brian Murray, which is alleged in Count One of the indictment." Appellant's Brief at 3 n.2.

Defendant submits that at most the government will be able to establish at trial that Officer Murray died at Rodman's Neck in the Bronx. The government does not allege, nor could it allege, in Count One that the police officer was aboard an aircraft "within the special aircraft jurisdiction of the United States" either before or at the time of his death.

[2/] By filing this motion to dismiss on the grounds set forth in this memorandum, defendant Zvonko Busic does not waive any other arguments that he might raise at trial that the death of Officer Brian Murray did not result from the commission of the air piracy charged in the indictment.

of the plain language of the statute, its legislative history and long-standing rules of statutory construction, defendant Zvonko Busic cannot be prosecuted under 49 U.S.C. § 1472(i) for the death of Officer Murray.

A. The Plain Language of the Statute

The "offense" of "aircraft piracy" is defined by 49 U.S.C. § 1472(i)(2) as follows:

> "*any seizure or exercise of control*, by force or violence, or by any other form of intimidation, and with wrongful intent, *of an aircraft within the special aircraft jurisdiction of the United States*." (Emphasis added.)

The term "special aircraft jurisdiction of the United States" is defined by 49 U.S.C. § 1301(34) in pertinent part as follows:

> "(a) civil aircraft of the United States . . .
>
> * * *
>
> *while that aircraft is in flight*, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation . . . ." (Emphasis added.)

By the plain language of the statute, it is abundantly clear that a defendant cannot be prosecuted under § 1472(i)(B) for "commission of the offense"[3] unless the death occurs (1) on

---

3/ A defendant may also be prosecuted for "attempted commission of the offense", which by virtue of 49 U.S.C. § 1472(i)(3) encompasses

> "an aircraft not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense or aircraft piracy been completed."

This attempt provision obviously has no bearing on this case since Count One does not allege that the death of Officer Murray resulted from the "attempted commission of the offense." Moreover, attempt is inapplicable here. As the Second Circuit stated in *United States* v. *Busic*, ___ F.2d ___ (2d Cir. 1977), at n.9: "Since the substantive crime was consummated, the appellees clearly could not have been prosecuted for 'attempted' air piracy."

the hijacked aircraft and (2) while the hijacked "aircraft is in flight." Any other construction of the statute would do violence to the careful distinctions drawn by Congress in drafting this federal criminal statute. When the language of a criminal statute admits of no ambiguity, it is not within the power of a federal court to alter or vary its terms. As one leading commentator stated in summarizing this well-established canon of statutory construction,

> "since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature had not clearly and unequivocally prescribed it. Thus a court has stated that the reason for the rule was 'to guard against the creation, by judicial construction, of criminal offenses not within the contemplation of the legislature.'" 3 Sutherland Statutory Construction § 59.03 at 8 (4th ed. 1974)

Likewise, this Court must resolve any doubt about the applicability of § 1472(i)(B) in favor of the defendant. Under a time-honored presumption of our law, doubts in the enforcement of a penal code must be resolved against the government and against the imposition of a harsher punishment. Bell v. United States, 349 U.S. 81 (1955).[4/]

It is a cardinal rule of federal jurisprudence that the reach of the judicial power of the United States is limited, and its courts can exercise jurisdiction only where Congress has specifically provided for it. Cary v. Curtis, 44 U.S. 236, 245

[4/] "It is an ancient rule of statutory construction and an oft-repeated one that penal statutes should be strictly construed against the government . . . and in favor of persons on whom such penalties are sought to be imposed." 3 Sutherland Statutory Construction, supra, § 59.03 at 6-7, citing United States v. Wiltberger, 5 Wheat (18 U.S.) 76, 95 (1820); see also McBoyle v. United States, 285 U.S. 25 (1931).

(1945); accord, Lockesty v. Phillips, 319 U.S. 182, 187-88 (1943). This rule has even greater force in the field of federal criminal jurisdiction where sensitive interests of federal-state relations are involved. The Supreme Court has ruled on numerous occasions that Congress must "plainly and unmistakably" make conduct a federal crime. United States v. Gradwell, 243 U.S. 476, 485 (1917).

In United States v. Bass, 404 U.S. 336, 349-50 (1971), the Supreme Court held that the government must prove an interstate nexus in federal prosecutions for possession of firearms. The Court's reasoning squarely applies in this case and bears quoting at length.

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. See, e.g., Younger v. Harris, 401 U.S. 37 (1971). As this Court emphasized only last Term in Rewis v. United States, [401 U.S. 808 (1971)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In Rewis, we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, 'would alter sensitive federal-state relationships [and] could overextend limited federal police resources.' While we noted there that '[i]t is not for us to weigh the merits of these factors,' we went on to conclude that 'the fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach].' 401 U.S., at 812. In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction. As in Rewis, the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance

> in the way now claimed by the Government. Absent a clearer statement of intention from Congress than is present here, we do not interpret § 1202(a) to reach the 'mere possession' of firearms." (Footnotes omitted.)

In still other decisions bearing on this issue, the Supreme Court has ruled in an equally unequivocal manner that, where the basis for federal jurisdiction is the locus of the offense -- as it must be in this case in view of the explicit Congressional definition of the offense in terms of "the special aircraft jurisdiction of the United States" -- the federal courts must narrowly construe the statute and may not create or carve out areas for federal criminal jurisdiction never intended by Congress.

> "We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." United States v. Bowman, 260 U.S. 94, 97-98 (1922).

B. Legislative History

Taking our cue from United States v. Bass, supra, and United States v. Bowman, supra, the legislative history of the federal air piracy statute evinces absolutely no Congressional intent to tamper with -- indeed, to alter radically -- the historical balance between federal and local criminal jurisdiction.

As originally passed in 1958, the federal legislation contained no criminal penalties for hijacking. Pub. L. No. 85-726, 72 Stat. 737. With the amendments in 1961, Congress made "aircraft piracy" a capital offense by adding § 1472(i). Pub. L. No. 87-197, 75 Stat. 466. The offense of "aircraft piracy" was defined as

> "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of *an aircraft in flight in air commerce*." (Emphasis added.)

Thus, from the advent of the exercise of criminal jurisdiction over aircraft piracy, Congress required that the seized aircraft be "in flight".

Nowhere in the Committee reports accompanying the 1961 Amendments is there any indication that Congress intended to sweep away the traditional dichotomy between federal and state authority in law enforcement. Indeed, just the opposite purpose is evident. As the Report of the House Committee on Interstate and Foreign Commerce states:

> "The primary purpose of this legislation is to amend the federal Aviation Act of 1958 so as to extend Federal criminal laws *to certain acts committed on board aircraft* -- *in particular, such acts as aircraft piracy, murder*, manslaughter, assault, maiming, carrying concealed deadly or dangerous weapons and stealing personal property." H.R. Rep. No. 958, 87th Cong., 1st Sess. 3 (1961)

Moreover, Congress was particularly sensitive to the interests of states in local law enforcement and carefully limited the reach of the federal criminal sanction to an "aircraft in flight."

> "As is well known, the Federal Government does not provide a general criminal code for all crimes committed in the United States. That is the province of the various States. However, criminal codes of the States are at times supplemented by Federal law in fields where the Federal Government has responsibilities.
>
> "We wish to emphasize that it is not our intent to divest the States of any jurisdiction they now have. The legislation merely seeks to give the Federal Government concurrent jurisdiction with the States in certain areas where it is felt that concurrent jurisdiction will contribute to the administration of justice and protect air commerce.

> "Federal criminal laws are applicable in many areas, such as those with respect to crimes committed on the high seas, and crimes involving interstate commerce, Federal reservations, crimes affecting Federal officers, and so on. The States also have laws in some of these areas, and frequently the same acts will constitute a crime under both Federal and State law. In other areas, where the States have no jurisdiction such as crimes committed on the high seas, the Federal law applies.
>
> "The present law relating to crimes aboard aircraft in flight follows the normal rule, which is that the offense is dealt with under the law of the State where the offense occurs.
>
> * * *
>
> "*This, we want to make clear, does not preempt any State jurisdiction but would only supplement it. To emphasize that, it should be pointed out that the reported bill, except for the provision relating to concealed deadly or dangerous weapons, covers only offenses committed while an aircraft is in flight. In flight means from that point on the runway at the end of the takeoff roll where the aircraft leaves the ground to that point on the landing runway where the aircraft touches down, and does not apply to acts committed on an aircraft on the ground.*" *Id.* at 5 (emphasis added); *see also id.* at 3-4.

The Senate Committee on Commerce was equally concerned about displacing customary local criminal jurisdiction.

> "Your committee wishes to make emphatically clear its recognition that police powers are traditionally and properly reserved to the States and has no intention to transgress upon this very sound principle. However, the problems encountered in effective enforcement of the laws, prosecution and apprehension when applied to offenses committed aboard aircraft are unique and not as easily susceptible of solution as they are on the ground. *The committee wishes to emphasize that the language of this bill covers offenses committed while an aircraft is in flight. In flight means from that point on the takeoff runway at the end of the takeoff roll to that point on the landing runway where the aircraft touches down, and does not apply to acts committed above an aircraft while it is on the ground. Local law is fully adequate to cover the latter situations.*" S. Rep. No. 694, 87th Cong., 1st Sess. 3-4 (1961) (emphasis added)

The amendments to the statuto in 1962 (Pub. L. No. 87-528, 76 Stat. 143) an[illegible] (Pub. L. No. 90-514, 82 Stat. 867) did not deal with the [illegible] provisions. In 1970, however, Congress amended the st[illegible] by substituting "within the special aircraft jurisdiction of the United States" for "in flight in air commerce" in the definition of "aircraft piracy" in § 1472(i)(2). Pub. L. No. 91-449, 84 Stat. 921. Congress also defined the new jurisdictional term in pertinent part in § 1301(32) as

> "the following aircraft while in flight --
>
> (a) civil aircraft of the United States;
>
> * * *
>
> "For purposes of this definition, an aircraft is considered to be in flight from the moment when power is applied for the purpose of takeoff until the moment when the landing run ends." (Emphasis added.)

The 1970 amendments to the statute left undisturbed, and the legislative history discloses no intent to modify, the precise distribution of criminal authority -- based on the affected aircraft being "in flight" -- created by Congress in 1961.

The latest alteration of the statute in 1974 resulted in a modest change in the definition of the "special aircraft jurisdiction of the United States". Pub. L. No. 93-366, 88 Stat. 409. The present definition, set forth above at page 3 of this memorandum, has been expanded to encompass, in pertinent part, events occurring once "the external doors are closed following embarkation until the moment one such door is opened for disembarkation . . . ." Notwithstanding this modified definition, it remains crystal clear that the offending conduct must occur on the aircraft regardless of whether it is about to take off or is actually airborne. The reach of federal authority is still, as it has always been, narrowly circumscribed.

The legislative history of the 1974 amendment fully supports our position. Once again Congress noted that the reach of "the special aircraft jurisdiction of the United States" was limited to "criminal acts aboard aircraft." H.R. Rep. No. 93-885, 93d Cong., 2d Sess. 10 (1974); see also S. Rep. No. 93-13, 93d

Cong., 1st Sess. 2 (1973). Indeed, the House Committee on Interstate and Foreign Commerce emphasized, by placing in italics the term "within", that the offense of air piracy is defined in terms of the "offense committed *within* the special aircraft jurisdiction of the United States." *Id.* at 11-12.

Over a span of 15 years -- from the initial exercise of federal criminal authority over air piracy -- Congress has periodically revisited this legislation. At no time has there been even the slightest suggestion that the national legislature intended to insinuate the federal government into traditionally local police problems of states and their municipalities. It borders on absurdity to suggest that any act somehow related in time with a hijacking can be converted for that reason alone into a federal law enforcement concern. This was clearly not the design of Congress in exercising limited authority in this field. Quite the contrary, Congress expressly preserved, and this Court must protect, "the sensitive relation between federal and state criminal jurisdiction." *United States* v. *Bass*, *supra*, 404 U.S. at 351.

C. *Similar Legislation*

It is axiomatic that in ascertaining the meaning of a statute and the purpose of Congress in using a particular term reference may be made to previous legislation incorporating the term. *Huddleston* v. *United States*, 415 U.S. 814 (1974).[5]

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[5] The rule of *in pair materia* is a reflection of practical experience in the interpretation of statutes. A legislative body generally uses a particular word with a consistent meaning in a given context. This rule is nothing more than a logical extension of the principle that individual sections of a single statute be construed together, for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject. *Erlenbaugh* v. *United States*, 409 U.S. 239 (1972).

In creating the concept of "special aircraft jurisdiction of the United States" in 1970, Congress did not write on a clean slate. It expressly borrowed from the definition of the term "special maritime and territorial jurisdiction of the United States" in 18 U.S.C. § 7.[6] That provision, and its predecessors, have been the subject of numerous judicial constructions. Congress, which must be presumed to have acted with knowledge of the judicial gloss placed on the special maritime and territorial grant of jurisdiction, intended to restrict in similar fashion the compass of federal criminal power.

In one of the earliest reported decisions, Circuit Justice Washington ruled, in a federal prosecution for murder on the high seas, that the United States courts have jurisdiction only if the death, as well as the mortal stroke, occurred on the high seas. United States v. McGill, Fed. Case No. 15,676 (C.C. Pa. 1806); cf. Commonwealth v. Macloon, 101 Mass. 1 (1869). There the defendant hit the victim with a piece of wood while aboard the ship in a harbour, but the victim died while on shore.

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[6] "The term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes:

"(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

"(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

"(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

"(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

"(5) Any aircraft belonging in whole or in part to the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

Similarly, in a case in which a lethal shot was fired from an American ship killing a native aboard a foreign schooner, Circuit Justice Story held that prosecution for murder was within the jurisdiction of the foreign government and not the United States. For purposes of federal "high seas" jurisdiction for murder, it is the locus where the deadly act -- there the shot -- took effect that governs. United States v. Davis, F. Cas. No. 14,932 (C.C. Mass. 1837).

Other case law construing the analogous "high seas" jurisdiction further supports defendant's argument that the mere existence of some relationship to an offense properly punishable by the federal government does not confer federal jurisdiction over the otherwise non-federally proscribed conduct. Thus, for example, in United States v. Morel, F. Cas. No. 15,807 (C.C. Pa. 1834), the court declined to find federal criminal jurisdiction in a case in which the accused stole goods in a foreign port and later brought them upon the high seas in an American vessel.

The construction advanced by the defendant is strikingly highlighted by United States v. Ross, F. Cas. No. 16,196 (C.C. R.I. 1813). There the defendant was indicted for murder of a passenger of a schooner on the high seas committed in furtherance of a conspiracy to seize a schooner with force. Overruling objections to federal jurisdiction, Circuit Justice Story observed that the "murder . . . was committed in the course of the execution of that conspiracy." Id. at 901.

The Ross prosecution is a classic example of the type of homicide that Congress sought to punish in the federal aircraft piracy statute. The murder occurred during the commission of the offense of piracy and aboard the ship while it was within the federal "high seas" jurisdiction. By the same token, defendant Zvonko Busic could be prosecuted by the federal government for a death resulting from aircraft piracy if, for example, Officer Murray had been a law enforcement officer aboard the aircraft and had been killed during the hijacking. However, once it is established that the death occurred outside the "special aircraft jurisdiction of the United States" -- on the ground and not aboard an aircraft poised for take-off -- a prosecution under § 1472(i)(B) must fail.

CONCLUSION

In United States v. Cordovo, 89 F. Supp. 298 (E.D.N.Y. 1950), Judge Kennedy, at a time when crimes on an aircraft over the high seas were not federal offenses, reluctantly found no federal jurisdiction to prosecute assaults on a pilot and stewardess of an airplane flying over the high seas. Citing many of the authorities relied upon by defendant Zvonko Busic, Judge Kennedy recognized the well-established doctrine that federal courts will not broaden or otherwise modify limited grants of federal criminal jurisdiction where the intent of Congress is to limit federal authority.

Defendant Zvonko Busic calls upon this Court to do likewise. Unlike United States v. Cordovo, however, the defendant will not escape prosecution for the death of Officer Brian Murray. He stands indicted -- and from the recent statements of the Assistant District Attorney will most assuredly be vigorously prosecuted -- for that offense in New York County. In the interests of long-standing principles of comity and the defendant's right not to be prosecuted for conduct not proscribed by federal law, we respectfully request that the Court dismiss Count One of the indictment for lack of jurisdiction and failure to charge an offense.

Dated: Washington, D. C.
February 23, 1977

Respectfully submitted,

Michael E. Tigar
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(202) 331-5085

Attorneys for Zvonko Busic

Of counsel:

Edward Bennett Williams
Pierce O'Donnell

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--------------------------------x

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,

Defendants.

--------------------------------x

76 Cr. 602 (JRB)

AFFIDAVIT OF SERVICE

MICHAEL E. TIGAR, being duly sworn, deposes and says:

1. I am over the age of eighteen years, and not a party to this action.

2. On February 23, 1977, I served the following papers: Notice of Motion and Memorandum of Points and Authorities in Support of Defendant Zvonko Busic's Motion to Dismiss Count 1 for Lack of Jurisdiction and Failure to Charge an Offense.

3. Service was effected by depositing a copy of each paper, first-class postage prepaid, in the United States mails at Washington, D. C., addressed as follows:

Peter Schlam, Esq.
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MICHAEL E. TIGAR

Subscribed to before me this 23rd day of February, 1977.

Notary Public

My Commission Expires July 31, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--------------------------------x

UNITED STATES OF AMERICA :

against :

ZVONKO BUSIC :
JULIENNE BUSIC
PETAR MATANIC : 76 CR 602
FRANE PESUT
MARK VLASIC :

Defendants :

--------------------------------x

United States Courthouse
Brooklyn, New York

February 24, 1977
10:30 a.m.

Before:

HONORABLE JOHN R. BARTELS,

U. S. D. J.

SHELDON SILVERMAN
Official Court Reporter

Appearances:

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Also Present:

BORIS MARUNA
Croatian Interpreter

THE CLERK: United States of America versus Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut, Mark Vlasic.

THE COURT: Gentlemen, what motions are we to hear first? There are so many. Do you want to decide amongst yourselves?

You have motions for discovery, motions for bills of particulars. You have an argument on the constitutionality of the air piracy statute.

Each of you has made separate motions. I think we ought to try to get some order into this proceeding.

What do you suggest? How do you want to handle it?

MR. TIGAR: Should we argue the dismissal, the constitutionality of the Air Piracy Act, death penalty provisions? That seems to be the first order of business.

THE COURT: I have a suggestion. I would think that you might argue that lastly, because I'm certainly not going to decide that off the bench.

MR. TIGAR: Understood.

THE COURT: You can understand that.

On the other hand, I can decide off the bench, of his crime and was meant to broaden materially the scope of discovery available to a defendant.

Rule 13, U.S. v. Crisona, that frequently quoted portion of the Advisory Committees notes reads that "the defendant is not required to designate because he may not always be aware of the statements or confessions are being recorded."

MR. TIGAR: That's in the AFRD citations.

THE COURT: That's done with. He will give you the statements.

Next?

MR. TIGAR: The next contested one is 6.

"State the manner in which the commission of the offense resulted in the death of New York City..."

THE COURT: Give me the page.

MR. TIGAR: Page 3, Item 6, if the Court please.

THE COURT: "State the manner in which the commission of the offense resulted in the death of New York City Police."

He says the proof at the trial will show the officer Murray's death was caused by the explosion of the bomb placed at the locker at Grand Central Station, which placement was a part of this offense.

an Assistant I moved to reargue the matter before Judge Rosling and he denied the motion for reargument and the order stands. It's not a published decision, but it involves a similar circumstance where the witnesses involved are not co-conspirators, but innocent people to whom the defendants had made statements. Those statements were subsequently reduced to reports and grand jury testimony.

Judge Rosling ordered they be turned over. In other words, in a situation like this--

THE COURT: I have the point, Mr. Bergman. I'm going to decide it if you give me your cases. If you give me your cases by five o'clock, Mr. Schlam, or six o'clock, yes, I'll let you know tomorrow morning. There's no use wasting any more time on that.

MR. BERGMAN: I do have a separate ground entirely for the production of the 302 reports. I think it's an important matter.

We previously discussed in conference with Mr. Schlam the proposition that the Government should turn over to the defense counsel for defendant Matanic copies of the 302 FBI reports of their interviews with the passengers. Our reason is twofold.

Our reasons are (1) the reasons advanced by Mr. Tigar under Rule 16, but I believe that we are entitled to those statements under the Brady case.

THE COURT: You want to argue it anyway. Go ahead, argue it.

MR. BERGMAN: A separate reason altogether.

I think at this point the Government will concede that there is evidence that they have uncovered showing that the defendant Matanic's conduct on board the plane--

THE COURT: Matanic might be in a different category.

MR. BERGMAN: I speak on behalf of Matanic because I'm his counsel.

THE COURT: It's not the same thing. Matanic could have made some statements which were exculpatory whereas Mr. Busic didn't.

MR. BERGMAN: Precisely. That is exactly our point. We're entitled to the discovery of those materials, and there's a reason of necessity for it.

Your Honor has signed this morning and we're greatly thankful, an order appointing an investigator. Between now and the beginning of the trial slated for March 14th, it would aid us immeasurably in having these 302 reports to see exactly which witnesses can offer testimony, exculpatory of Mr. Matanic . There's really, simply no reason under the Brady line of decisions why the Government should not turn these over to us.

THE COURT: That's on the assumption there's Brady material.

MR. BERGMAN: I submit under the Hilton case, the unilateral determination--

THE COURT: If they don't give you Brady material which they have, they're in hot water. Let them make that decision.

MR. BERGMAN: Under the Hilton decision, your Honor, the Government is bound not to make a unilateral decision as to these matters.
I would submit that if the Court wants to adopt a middle ground -- I don't think it's necessary -- that the Government should submit the 302 reports to the Court and I'll briefly outline without disclosing what the defense is in this case, why we believe that those reports will reflect favorably on the defendant Matanic.

There's going to be a serious issue of Matanic's knowledge in this case. I think that's in a way reflected by the Government's answers to the bill of particulars in which we requested--

THE COURT: I can't do that now. I have your point. I'll consider it. I might take a middle ground.

Do you have a bill of particulars?

MR. BERGMAN: Yes, your Honor.

THE COURT: That you want to argue about it? Let me see it. Why haven't my rulings on Mr. Tigar's discovery motion and bill of particulars more or less covered all of yours?

MR. BERGMAN: I have not seen the answers to the particulars nor the requests of the particulars by Mr. Tigar.

THE COURT: You never heard or saw his requests either?

Gentlemen, I'm going to ask you hereafter to try to work together.

MR. BERGMAN: We have.

THE COURT: It's going to help all of you.

MR. BERGMAN: Precisely.

THE COURT: It's going to help the Court, too. There's no point in your covering the same thing twice, no point at all.

MR. BERGMAN: You're absolutely right, your Honor.

THE COURT: Let me get yours.

MR. BERGMAN: Whereas I think--

THE COURT: Wait a minute. Let me get your applications.

MR. BERGMAN: We have asked a series of questions simply to elucidate the charges against Mr. Matanic in the first count of the indictment with respect to the charge of a death resulting from the air piracy.

Frankly, the Government's response in their bill of particulars leaves us nowhere.

THE COURT: That's an exaggeration.

MR. BERGMAN: It's true, your Honor.

THE COURT: Let's go over it one by one.

MR. BERGMAN: I'll skip to the important ones, your Honor.

THE COURT: Let's take it. I have two of your motions. I don't know which one they answer first. Let's talk about 12(d)(2).

MR. BERGMAN: I don't think I have much more to say on discovery. Mr. Schlam and I have spoken.

THE COURT: You're talking about a bill of particulars.

MR. BERGMAN: Just the bill of particulars, unless Mr. Schlam wants to put on the record exactly what we have agreed to with regard to the discovery.

THE COURT: Now you have (1) set forth the means and manner by which the defendant Petar Matanic--

MR. BERGMAN: I'm not going to press that.

THE COURT: (2) It's the same thing.

MR. BERGMAN: I'm not pressing that either.

THE COURT: You come--

MR. BERGMAN: We come to (3).

THE COURT: The Government claims that Matanic is a principal, aider and abettor--

MR. BERGMAN: The Government has declined--

THE COURT: It's declined many times. We have had this up a thousand times. He doesn't have to say. You have to wait.

(4), set forth the indictment means by the expression--

MR. BERGMAN: I'm not pressing that.

THE COURT: Why don't you pick out the ones you're going to press.

MR. BERGMAN: No. 8.

THE COURT: Means and manner in which commission of the crime-- Didn't we have that? I thought we discussed that somewhat with Mr. Tigar, did we not?

Didn't he say the officer's death occurred, a locker, placement of the bomb, an offense--

MR. BERGMAN: I'm satisfied with the Government's answer.

THE COURT: Then we have the next one.

MR. BERGMAN: Your Honor--

THE COURT: Did you get these this morning, too?

MR. BERGMAN: We have had these for some time. No. 11, your Honor.

THE COURT: Set forth the Government claims that the defendant Petar Matanic participated in any aspect of the matters covered by Demand 10 above, that is set forth the instrument, set forth whether the Government claims--

Well, his answer to that is that he does not sufficiently answer the request as far as 11(a) and (b) are concerned. The Government refuses to furnish on the grounds it's ill-phrased, ambiguous, as such, any attempt to answer him would unduly restrict the proof, etc., etc.

MR. BERGMAN: We're not asking for evidence.

THE COURT: What do you want, to know the evidence?

MR. BERGMAN: I want to know whether or not as part of the charge in the first count of the indictment the Government claims the defendant Matanic had anything to do--

THE COURT: It's pretty clear he does. He says exactly that in the indictment.

MR. SCHLAM: He's a defendant.

MR. BERGMAN: --with preparation of the instrumentality by which death was caused.

THE COURT: I don't think that's necessary. I don't have to tell you that. That's on evidence.

MR. BERGMAN: We're entitled to know that. The question of whether or not the Government is going to connect Matanic in one way or the other to the placement of the bomb or in any respect having knowledge of the bomb puts him in a completely different position of the case.

THE COURT: They say so. Let me read the indictment.

MR. BERGMAN: The indictment doesn't inform the defendant one way or the other.

THE COURT: They say by threat -- You're talking about Count 2?

MR. BERGMAN: Right -- Count 1.

THE COURT: Count 2, isn't it? Count 1, I'm sorry.

They said that all these defendants, by

threat, force, violence, with wrongful intent, did seize, exercise control of the aircraft, so forth, and with special aircraft jurisdiction, that is within the special aircraft jurisdiction of th United States, a Boing 727, known as TWA Flight 355, etc., the commission of which offense resulted in the death of a New York City police officer, Mr. Murphy.

He says to you that he's already told you that the death occurred by reason of the placement of a bomb, resulted from an explosion of a bomb placed in a locker at Grand Central Station, that the bomb was the offense of air piracy.

You know what happened. That's it. It certainly seems to me you're clearly advised as to the part that Matanic played in it.

MR. BERGMAN: If this was a situation in which the death had resulted on the plane during the course of the hijacking, I would agree with your Honor.

THE COURT: No, it didn't. It occurred by reason of a bomb being placed in the locker. I think he'll tell you that Matanic didn't place the bomb in it. Would you say that?

MR. SCHLAM: Your Honor, frankly I don't know who placed the bomb in the locker except that the evidence will show one of the persons that did do it--

THE COURT: You say it's the belief of the Government that Busic may have had the bomb--

MR. SCHLAM: I was going to say that other than Busic, who else may have participated in this, I'm not prepared to limit our arguments.

THE COURT: Will you say it's the Government's belief that Busic placed the bomb in the locker?

MR. SCHLAM: Yes, that will be our theory.

THE COURT: You'll answer it, give him that additional information.

Mr. Pattison--

MR. SCHLAM: If evidence reflects to Matanic placing the bomb, being an accomplice of Mr. Busic, we'll give him that.

MR. BERGMAN: Apart from his role on the plane?

MR. SCHLAM: Directly placing the bomb.

MR. BERGMAN: That's the crux of the matter. We want to know whether or not the defendant is being charged, defendant Matanic, with activity relating to the bomb which is the instrumentality of death apart from his role in the hijacking.

THE COURT: He want to know the connecting link.

MR. SCHLAM: The connecting link that the bomb was part of the hijacking.

He was a hijacker under Section 2, that he's responsible for all the acts that took place in connection with the hijacking. That's our theory.

THE COURT: He's liable?

MR. SCHLAM: Liable under Section 2.

THE COURT: Your theory is that you don't have to say he personally placed it?

MR. SCHLAM: Exactly.

THE COURT: That's it, causation and association, aiding and abetting.

MR. BERGMAN: That's the theory that the defendant is placed in that count.

THE COURT: Yes.

Next? What number?

MR. BERGMAN: Skipping on--

THE COURT: You've got a lot of answers.

MR. BERGMAN: Skipping on to No. 16, which involves the conspiracy count.

THE COURT: State whether the Government alleges that the conspirators agreed to commit murder to achieve, etc, etc. What was his answer?

MR. BERGMAN: Declined as going beyond the scope of the bill of particulars. I don't think it does, your Honor.

THE COURT: It does. They don't have to. The particulars are pretty-- The indictment is pretty specific. It says that they hijacked the plane and as a result murder. As a matter of fact, it may be completely irrelevant whether they intended to commit a murder at the time.

I won't require him to answer that.

MR. BERGMAN: The reason I press it now in answer to No. 15--

THE COURT: Wait a minute. Let me get it.

State whether the conspiracy had any other unlawful object other than the object set forth, etc., etc., let me ask you about that. I'm glad you brought that up.

Was this investigation continuing? How can you do this? You're not talking about an investigation by the grand jury?

MR. SCHLAM: I want to ask permission of the Court to cite a case from the seat of my pants, your Honor.

THE COURT: I'm not interested in that kind of case.

MR. SCHLAM: This case is U.S. v. Poetta, a Second Circuit case. I think it was decided

THE COURT: Don't you think you do that on papers, don't you?

MR. SCHLAM: We can move on papers. We will.

MR. TIGAR: Your Honor, may I say that Mr. Schlam-- as I think Mr. Pattison-- had two months ago, once again last week raised the Government desire for discovery from us. I have consistently since getting into this case, indicated my willingness to sit down, as he's done with me, and discuss with him the things he wants. I think that might even be a reasonable prerequisite to even moving on papers.

MR. SCHLAM: Mr. Tigar's invitation is appreciated. I wish to make a statement on the record so there's no question about the fact that we will ask for reciprocal discovery.

MR. BERGMAN: I have nothing more, your Honor.

THE COURT: I think I'll have to set some dates down after this is all over.

MR. ROCHMAN: I assume, your Honor, that your rulings with respect to Mr. Bergman and the defendant Matanic will extend to all defendants.

THE COURT: My rulings and bills of particulars applies to all defendants, the same information will be given.

MR. ROCHMAN: Thank you, sir.

THE COURT: All defendants, the same way.

We have another motion. There's one motion that wasn't answered. I don't know whether the Government wants me to grant that motion completely. I suppose this is a motion for discovery by David Rudolph and Michael Ira Asen representing the defendant Julienne Busic.

Shall I just grant the whole motion?

MR. SCHLAM: No, your Honor.

THE COURT: Apparently you don't oppose.

MR. SCHLAM: I want to point out to your Honor--

THE COURT: No opposition.

MR. SCHLAM: Opposition with a proviso, your Honor. The proviso is that I just want to indicate-- O.K., I just want to indicate that the statements made by Mr. Rudolph or the requests made by Mr. Rudolph, I think, are covered in large part by the requests made--

THE COURT: In large part they are. There are some that are not covered.

MR. SCHLAM: Specifically different.

THE COURT: For instance, there's one that says any and all statements taken by the State and Federal Government. The State, I don't know whether you have from all witnesses, co-defendants, regarding defendant Julienne -- that's No.A, regarding Julienne Busic's conduct and attitude on the plane.

MR. RUDOLPH: That request is similar to Mr. Bergman's request from Mr. Matanic. Based on our interviews with the various passengers, we've discovered that many of them had very positive things to say about Mrs. Busic's conduct on the plane, the way she treated the passengers, things she said to the passengers.

It's our opinion, based on that investigation, that the 302's taken by the FBI of the passengers on the plane constitute Brady material under our theory of the defense. That's why that request is in there.

THE COURT: I see no objection by the Government to it.

MR. SCHLAM: We do object to it.

THE COURT: Where is your papers then?

MR. SCHLAM: We didn't specifically answer this motion. However--

THE COURT: Why not?

MR. SCHLAM: Because it repeats in substantial part the motions which we did answer and I think in this case this request illustrates it, your

Honor, because that request is almost exactly the same request that Mr. Bergman made.

THE COURT: No, it isn't exactly the same thing.

MR. SCHLAM: 302's of passengers? We oppose that.

THE COURT: By the way, I remember in reading some of these papers that a request was made for a list of passengers.

MR. BEGAMAN: Yes.

THE COURT: Who made that?

MR. BERGMAN: We did, your Honor, on behalf of the defendant Matanic.

THE COURT: What happened to that?

MR. BERGMAN: That's part of our informal discussions.

THE COURT: He's going to give you a list of the passengers?

MR. BERGMAN: We're going to receive a copy of the manifest, to the extent that Mr. Schlam is able to provide us with a list, I believe?

MR. SCHLAM: We agreed to that as Mr. Bergman stated.

THE COURT: Every one gets it.

MR. SCHLAM: Everyone gets it.

THE COURT: What are we going to do about this?

MR. RUDOLPH: I suggest that I'd be willing to sit down with Mr. Schlam as we tried to arrange in the past, sit down with him, say, later today, go through this and anything we don't agree upon--

THE COURT: You mean I'm going to have another motion? No, I'm going to decide it right now. We can't continue. If he doesn't agree to it, it's too bad for him. He's got to argue it right now. I can't conduct a court this way. I want to see you gentlemen, for the Government, anyway, right after this hearing.

MR. SCHLAM: Yes, sir.

THE COURT: This cannot continue and will not continue.

MR. SCHLAM: Your Honor, I think the questions that your Honor has raised--

THE COURT: Some of these motions have been pending before you since November.

MR. SCHLAM: I state--

THE COURT: You haven't gotten in the papers until yesterday or the day before. I'm not going to permit that.

MR. SCHLAM: Your Honor, I think with respect to this motion--

THE COURT: This motion isn't answered at all.

MR. SCHLAM: When we spoke after the hearing, your Honor, I think you might find our reasons justified.

THE COURT: I might, but I can't conduct a hearing this way. We can't carry on the administration of justice without you complying with the rules.

MR. SCHLAM: We seek to comply with the rules.

THE COURT: Pardon?

MR. SCHLAM: We seek to comply with the rules.

THE COURT: You seek to but you haven't.

What are we going to do about this? This is hanging in the air.

MR. RUDOLPH: Your Honor, I think there's only a couple of items--

THE COURT: Why don't you do this: Why not take it and sit down with Mr. Schlam and Mr. Pattison. I'll be here, as usual, until later; if you can't agree you can come in.

MR. RUDOLPH: With the exception of one or two things we'll be able to agree on everything.

I think that's a good idea.

THE COURT: Are we ready to argue the death penalty?

MR. ROCHMAN: If you give me a moment, it's a very brief matter.

THE COURT: All right.

MR. ROCHMAN: I assume your Honor's ruling on Mr. Tigar's argument and Mr. Bergman's argument, and your Honor's rulings apply to all defendants. The only reason I rise on behalf of Mr. Pesut, it's my understanding of the recent Supreme Court case, U.S. v. Agurs, the defendant is in a better position, having made specific request for Brady material, as opposed to a general request.

THE COURT: You made specific requests. It's on the record. He's got to give it to you.

MR. ROCHMAN: That's the only reason I rise. Specifically, with respect to Mr. Pesut, any evidence the Government has which would indicate a lack of knowledge or participation on his part with respect to the placement of the bomb in this case. That is, first we specifically ask information or any evidence which would weaken or impeach any evidence tending to indicate such participation.

THE COURT: Wait a minute. You want evidence?

MR. ROCHMAN: I'm talking about Brady material.

THE COURT: Brady material. Wait a minute. Specifics on whether or not Mr. Pesut put the bomb in the locker are not Brady material.

MR. ROCHMAN: I said any evidence indicating that he lacked such knowledge of the bomb or participated in the placement or preparation of the bomb.

THE COURT: I can't find that. That doesn't make much sense to me. He's charged with air piracy which resulted in death. You want specifics as to-- You know exactly what happened. You know-- Every one knows exactly what happened. All the defendants are completely apprised of the claim, to wit, that as part of the air piracy a bomb was placed in the subway station at Grand Central Station subway locker; a bomb was placed in there by one of these defendants which the Government believes to be Busic. That's the claim.

I don't see how you can ask the Government to do anything more.

MR. ROCHMAN: Your Honor--

THE COURT: If you say, "Well, the Government knows that Pesut didn't do it, that's Brady material," that's not Brady material at all.

MR. ROCHMAN: Our position is that it is.

THE COURT: You throw out all questions of causation, aiding and abetting.

MR. ROCHMAN: I say there's no other theories that your Honor may find valid.

THE COURT: I'm not interested in theories.

MR. ROCHMAN: That's encompassed within the term Brady material.

THE COURT: You make the request. The Government understands your request. We'll act accordingly -- it will act according to its own conscience.

MR. ROCHMAN: I join Mr. Bergman and Rudolph in requesting any evidence of conduct or statements on Mr. Pesut's part during actual flight of the aircraft.

THE COURT: What you want is the statements made to passengers?

MR. ROCHMAN: On the grounds, again, joining them on the grounds that it's potentially Brady material. Obviously I adopt Mr. Tigar's argument. Your Honor ruled we adopted all those arguments.

THE COURT: The first thing I'm going to do is by five o'clock have a decision. If you gentlemen want to give me some cases, fine. I'll give you a decision whether I get cases from you gentlemen or not. I would rather have them. I would like them. Get them in. I said I would see you tomorrow morning, so you have a chance--

MR. RIGAR: The Government would ask for tomorrow morning. If we, with our relatively more meager resources, are able to do it by this afternoon, I see no reason why the Government should not carry us on that.

THE COURT: As long as I get it in by five o'clock I'll give you a decision by six or at least when I come in tomorrow at 9:30. I may have to take until 9:30, gentlemen, tomorrow morning.

I'll give you a decision on it.

Have you considered any intermediate ground so the Court might look at those statements first and then render a decision as to whether they should be given or not given?

Of course, if you're absolutely entitled to it, you shouldn't consider any intermediate grounds. That is to say, if these statements are statements covered by Rule 16, that's it. There's nothing intermediate about it.

If they are not, then I still might, after looking at them, feel that they are necessary, tending to have some exculpatory influence as far as the defendants' attitudes or intent is concerned.

MR. ROCHMAN: Might we have a moment?

THE COURT: Yes.

MR. TIGAR: Might we have a brief recess so that we can answer the procedural questions of the Court?

THE COURT: I see Miss Rosner has certainly now thought of something. I wouldn't want to miss that.

MR. TIGAR: Nor would I, your Honor.

(Recess)

THE COURT: Where do we stand?

MR. TIGAR: If your Honor please, some of the defendants have slightly differing positions.

For defendant Busic, our position is that for Rule 16 purposes, we feel we are entitled to such portions of written materials in the Government's possession as reflects statements of the defendant and only such portions as reflect such statements.

Before the end of the day we'll deliver to the Court some case law--

THE COURT: I think you're probably right, because I'm doing a little research already and it looks like there's some cases which indicate that as far as the statements made, oral statements made to others, should be surrendered.

MR. SCHLAM: Is that verbatim statements?

THE COURT: Yes, I'll give you the cases. I'll still give you an opportunity to send in your cases.

MR. SCHLAM: Yes.

THE COURT: It looks like from the cases that I've seen that's the way it is.

MR. TIGAR: There's a second issue raised here by some defendants. That is the issue of Brady material. As to that and on behalf of the defendant Busic, I would have no objection to the Court continuing an in camera review of the 302 forms that are in the Government's possession. I think that--

THE COURT: Of course,if you're entitled to all the statements made they would be only in connection with statements made as to Busic, not as to the others.

MR. TIGAR: That's right.

THE COURT: I don't know why you don't-- if the cases are clear that you should give the statements, I don't know why you just don't give all the statements, everybody.

Furthermore, you can understand if I gave Mr. Tigar statements made by Busic, that he's probably going to give them to the other defendants or make them available.

MR. TIGAR: Yes, of course.

THE COURT: There's no question about that.

MR. TIGAR: No.

THE COURT: Let's not play games. Give them all to everybody.

MR. SCHLAM: If we hand them over it wouldn't make any difference to us to hand them over to one or five. That's not the point. The only point is whether we're called upon by law to hand them over.

THE COURT: I'll go over it very carefully. I won't rule without being convinced.

MR. TIGAR: With that, your Honor, if there's any decisional--

THE COURT: You don't have to talk about Brady.

MR. TIGAR: That's right. If we get to that point, under Rule 16 we don't have to talk about Brady. If we do get to a Brady situation, we have no objection to an in camera inspection. That's all I need say about that.

MS. ROSNER: Your Honor, may I just say something briefly as to this issue? With the Court's permission I see two different issues, your Honor.

The Government has somewhat beclouded it unfairly.

THE COURT: What's that, about what?

MS. ROSNER: On the Rule 16 aspect of the motions. In all other respects we join in the defendants' motions, argument, and desire to submit on papers. However, with respect to this one aspect of the application, Judge, I would offer the following thoughts to the Court: the prosecutor suggested this morning that the question of whether --

THE COURT: Weapon?

MS. ROSNER: --question of whether a defendant's statements had been reduced in verbatim form was one of significance.

I respectfully submit it is not, for this reason:

When the witness is called on the trial to testify as to what a given defendant said, it is not the subject of an appropriate objection that the witness is unable to recall verbatim what the defendant said. The sum or substance of the statement rendered at trial by the witness is the defendant's admission. It's the defendant's admission at trial and it's the defendant's admission for the purpose of Rule 16.

THE COURT: No. You see what happens with something like this: the defendant presumptively makes a statement to a passenger.

The passenger subsequently makes a statement to FBI agents. The passenger's statement to the FBI statement may not, certainly, in all probability not be an in haec verba statement made by the defendant. That can be understood.

What happens after that causes confusion. The FBI agent might not even take down correctly what the passenger said.

MS. ROSNER: Your Honor, the FBI agent is trained to elicit from the passengers what they have said. Along these lines, I might note, your Honor, to insure the integrity of preservation of this information, the Ninth Circuit recently in U.S. v. Harris, in September of this year, and it has since been followed by other circuits, has required the preservation of original notes, so that those procedures under which the FBI is trained to get as accurate a rendition of information as possible are followed in every way to insure that as close to verbatim as possible is what is turned over.

THE COURT: I will look at the cases.

MS. ROSNER: One other thought, your Honor. The only interest the Government can possibly have in not turning over these statements is the revelation of the identity of witnesses.

To that extent and so that no burden is placed on the Court to review these matters, the Government is perfectly capable, if they wish to, of redacting the names of witnesses.

Even that, in light of their concession that they will turn over the manifest and the list of witnesses shows, your Honor, how utterly futile it is to go through this entire procedure.

The 302's, to the extent they reflect defendants' statements, should be turned over under Rule 16, your Honor. I don't think the Court should be burdened with in camera submissions, and we will oppose that on behalf of the defendant Vlasic.

THE COURT: While you're here, did we take care of your discovery motions?

MS. ROSNER: I'm willing to submit and rest on the argument of other counsel rather than belabor any other point.

THE COURT: You heard the rulings.

MS. ROSNER: I did.

THE COURT: What he gives to Mr. Tigar he'll give to you. That satisfies your discovery matters.

MS. ROSNER: The only matter I want to address is this point, your Honor. Thank you, your Honor.

THE COURT: Very well.

MR. BERGMAN: In the event your Honor does rule with respect to Rule 16 requests, I was wondering if it would be appropriate to inquire of Mr. Schlam the form in which those 302's will be turned over to us, because a 302, as your Honor well knows, has many paragraphs, not only including statements which might be attributed to the defendant, but as well the observations, what witnesse saw during the flight, how a particular defendant conducted himself -- that might strictly be construed I suppose by the Government as not a statement within Rule 16.

THE COURT: It wouldn't be a statement, of course not. You want that, too? You want that, too?

MR. BERGMAN: No, your Honor. What I envision is if Rule 16 requests are complied with liberally by the Government, we need not probably go on to the point. If it is not, I would suggest to the Court in behalf of Mr. Matanic, and speaking for Mr. Rudolph on behalf of Julienne Busic, that if we are not provided with a full, in essence, a full 302, that we would reserve the right to request that your Honor review the entire reports in camera as they relate to Busic and Matanic.

Moreover, your Honor, let me just finish the thought, that we would be prepared, if your Honor wished us, to submit to the Court in camera a statement, a full statement of why we believe certain observations made by people on the plane would amount to exculpatory material.

Ww would provide to the Court precisely, I suppose, what the defense would be.

THE COURT: I have it.

Let me ask you this: What would be exculpatory, if you assume the Government has proven there was a conspiracy, they arrived on the plane; they showed the bombs, etc., etc. Thereafter you had an FBI agent interview all the passengers and some of them said, "Well, yes, this is exactly what happened. This was a lovely young lady, seemed very pleasant. She wasn't rough with us." Is that exculpatory?

MR. BERGMAN: The point I wish to make to your Honor in camera goes beyond simply saying the defendants were polite and nice.

THE COURT: You see, they have difficulty. You have to be fair here. Well, maybe you are being fair in what you're saying. Let me decide what is exculpatory.

MR. BERGMAN: Yes.

THE COURT: I'll agree to that; yes, that's different. I thought you were asking them to decide what's exculpatory.

MR. BERGMAN: I don't suppose the Government could make that unilateral determination without my disclosing what our defense is to the Government. I'm not going to do that.

THE COURT: You can disclose your defense to me if I have it.

MR. BERGMAN: Yes.

THE COURT: And I decide whether this statement is exculpatory in consideration of that defense.

MR. BERGMAN: Precisely, sir.

MR. ROCHMAN: On behalf of Mr. Pesut, we join in Mr. Bergman's and Rudolph's application -- their positon. On behalf of Mr. Pesut, I would point out to your Honor that our position is taking your Honor's hypothetical, assuming that statements were made by passengers concerning the conduct of Mr. Pesut on the airplane, indicating as your Honor put it, he was a nice fellow, that would go to the issue of punishment and under Brady that would be exculpatory material, under the penalty provisions one of the aggravating factors perhaps deals--

THE COURT: Wait a minute.

MR. ROCHMAN: It's another argument in addition to those advanced.

THE COURT: You're way ahead of me.

MR. ROCHMAN: I hope not.

THE COURT: I mean by that I haven't been able to look at the statement.

MR. ROCHMAN: I see. I wanted to indicate that would be our position.

THE COURT: I assume perhaps you generally know it by this time a little bit about what some of the passengers must have said. You probably have an investigator and perhaps talked to them. I don't know. Otherwise, you wouldn't have these thoughts.

I'm not too sure about that. Have you had a chance to talk to the passengers?

MR. ROCHMAN: I'm not the appropriate counsel

ERK:om

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

NOTICE OF MOTION

-v-

76 CR 602 (JRB)

ZVONKO BUSIC, JULIENNE BUSIC, FRANE PESUT, PETAR MATANIC and MARK VLASIC,

Defendants.

- X

S I R S:

PLEASE TAKE NOTICE that on the annexed affidavit of EDWARD R. KORMAN, sworn to on March 1, 1977, the UNITED STATES OF AMERICA moves for an order (1) precluding the defendant, ZVONKO BUSIC, from raising the defense of insanity or introducing expert testimony relating to a "mental condition" on the ground that he failed to file a timely or adequate notice as required by F.R. Crim. P., Rule 12.2 or (2) alternatively, as a condition to permitting late filing of the notice, an order directing a more specific and detailed notice as well as an order directing the defendant, ZVONKO BUSIC, to submit to a psychiatric examination.

Yours etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

By:
EDWARD R. KORMAN
Chief Assistant
United States Attorney

Dated: March 1, 1977

To : Williams and Connolly, Esqs.
1000 Hill Building
Washington, D.C. 20006

ERK:om

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

UNITED STATES OF AMERICA

-v-

ZVONKO BUSIC, JULIENNE BUSIC, FRANE PESUT, PETAR MATANIC and MARK VLASIC,

Defendants.

- x

AFFIDAVIT

76 CR 602 (JRB)

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

EDWARD R. KORMAN, being duly sworn, deposes and says:

I am Chief Assistant United States Attorney for the Eastern District of New York and make this affidavit in support of the application of the UNITED STATES OF AMERICA (1) precluding the defendant, ZVONKO BUSIC, from raising the defense of insanity and from introducing expert testimony relating to a mental condition on the ground that he failed to file a timely or adequate notice of defense as required by F.R. Cr. P., Rule 12.2, or (2), alternatively, as a condition to permitting the late filing of the notice, directing a more specific and detailed notice as well as a psychiatric examination.

A. The Untimeliness of the Notice

1. F.R. Cr. P., Rule 12.2(a) provides that "insanity may not be raised as a defense" if a notice of defense is not filed "within the time provided for the filing of pretrial motions or at such later time as the court may direct". F.R. Cr. P., Rule 12.2(b) contains a similar provision regarding the introduction of expert testimony. The time for the filing of pretrial motions passed on December 6, 1976 and we are not aware of any order which permitted a notice of defense to be filed on February 25, 1977, almost three months later.

2. While the district court "for cause shown" may allow a late filing of the notice or make any other appropriate order to mitigate the prejudice of an untimely filing, we submit that no "cause" has been shown. The defendant states that "the pretrial preparation of a defense based upon mental condition has been retarded by the fact that the defendant has not been granted bail and the attendant delays and inconveniences stemming from his incarceration".

3. We believe this lame excuse is hardly sufficient, without a good deal more explanation, for this eleventh hour notice. The district court can take judicial notice of the resources which are available to the defendant, BUSIC, and we believe that the district court is entitled to a much more specific statement of the ways in which Mr. Busic's incarceration interfered with their ability to timely raise this issue. Indeed, assuming this is a good faith defense there is an obvious tactical reason for the delay.

4. The court may recall the extensive effort which was made to obtain the release of the defendant and the numerous testimonials as to Mr. Busic's character which the defendant somehow managed to assemble despite his incarceration. Of course, it would hardly have been wise to suggest that Busic was mentally deranged while they were telling you and the Court of Appeals that Mr. Busic "is an acknowledged leader in the community -- a man to whom others look with respect and admiration" (Br. 6-7), and that "the appellant's friends as well as religious civic leaders in the community have no reservations about his peaceful, nonviolent behavior if released pending trial".

5. We believe that before it grants relief from the default provisions of F.R. Cr. P., Rule 12.2, the district court is entitled to know when it was that the defendant's counsel first suspected that Mr. Busic was insane when he committed the offenses with which he was charged and whether or not the delay in asserting the claim was deliberately calculated.

B. The Adequacy of the Notice

1. The untimely notice filed by the defendant is inadequate because it fails to set forth the slightest detail regarding the nature of the defense he intends to raise. Rule 12.2(provides for notice of "the defense of insanity", and Rule 12.2(b) provides for a notice regarding the introduction of expert testimony relating to a "mental disease, defect or other condition bearing on the issue whether [the defendant] had the mental state required for the offense charged".

2. The notice filed here merely states that the defendant intends to rely on a defense "based on a mental condition", without specifying in any way what that mental condition is or whether, indeed, the term used synonymous with "the defense of insanity". Moreover, the notice regarding the expert witness fails to state, even in the most general terms, whether his testimony will relate to the "defense of insanity" or to a mental condition bearing on whether the defendant "had the mental state required for the offense charged".

3. If the district court is to grant the defendant permission to file a late notice the defendant should at the very least be required to provide information sufficient to enable the United States to prepare a response without needlessly delaying and interrupting the trial.

C. The Psychiatric Examination

1. Rule 12.2(c) provides for the entry of an order directing the defendant to submit to a psychiatric examination in an appropriate case. Quite plainly such an examination is appropriate here, given the untimely and inadequate notice, so that we will be able to respond to the so called defense based on mental condition.

WHEREFORE, it is respectfully submitted that the defendant be precluded from putting in a defense based on insanity and from introducing expert testimony relating to a mental condition because of his untimely and inadequate notice. If he is permitted to file the untimely notice, it should be conditioned on the filing of a much more specific and detailed notice. Moreover, the defendant should also be directed to submit to a psychiatric examination.

Edward R Korman

EDWARD R. KORMAN
Chief Assistant
United States Attorney

Sworn to before me this
1st day of March 1977

____

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

Olga S. Morgan, being duly sworn, says that on the 1st day of March 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, an Notice of Motion and Affidavit of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William and Connolly, Esqs.
1000 Hill Building
Washington, D.C. 20006

Sworn to before me this
1st day of March 1977

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

______________ being duly sworn, says that he is employed in the office of the United States Attorney for the Eastern District of New York. That on the ______ day of ______________, he served a true copy of the annexed ______________ on the office of ______________ attorney for ______________ herein, located at ______________, Borough of ______________, City of New York, by leaving a true copy of same with his clerk or other person in charge of said office.

Sworn to before me this
day of

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----------------------------------x

UNITED STATES OF AMERICA :

-against- :

ZVONKO BUSIC, JULIENNE BUSIC, : 76-CR-602
PETAR METANIC, FRANE PESUT
and MARC VLASIC, :
Defendants.
:
-----------------------------------x

BARTELS, District Judge

MEMORANDUM-DECISION and ORDER

Defendants move under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, 18 U.S.C., for disclosure of evidence by the government including, among other things, oral statements made by defendants to third parties which were subsequently reported to and recorded by government agents. The court has already ruled upon the other items included in defendants' discovery applications and this memorandum is limited to these statements only.

The court has examined the cases submitted by defendants in support of their position and though it agrees that a broad interpretation should be given to Rule 16, it does not agree that these authorities, United States v. O'Brien, 444 F.2d 1082 (7th Cir. 1971) (interpreting "subject matter as to which the witness has testified" in 18 U.S.C. § 3500(b)); Karp v. United States, 277 F.2d 843 (8th Cir.), cert. denied, 364 U.S. 842 (1960) (report of testifying government agent not per se outside scope of 18 U.S.C. § 3500); United States v. Bryant, 439 F.2d 642 (D.C.Cir. 1971) (pre-arrest tape recordings of defendant's statements discoverable under Fed.R.Cr.P. 16), and United States v. Crisona, 416 F.2d 107 (2d Cir.), cert. denied, 397 U.S. 961 (1969) (semble), justify the disclosure of the particular statements sought here. We believe that such hearsay reports to third parties do not fall within the parameters of "written or recorded statements made by the defendant" described in Rule 16(a)(1)(A), and are in reality statements by government witnesses or prospective government witnesses not subject to discovery except as provided in 18 U.S.C. § 3500. Rule 16(a)(2). The interposition of a third person between the defendant and the government agent does completely, it seems to us, alter the essential character of the statement as the defendant's statement. The difference has been amply explained in United States v. Callahan, 534

F.2d 763 (7th Cir.), cert. denied, 45 U.S.L.W. 3250 (U.S. Oct. 4, 1976); United States v. Feinberg, 502 F.2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 926 (1975); United States v. Walk, 533 F.2d 417 (9th Cir. 1975); United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972). There is also a distinction between a recorded transcript and an oral conversation of the defendant with a third party subsequently reduced to writing. As stated by Judge Gurfein (now Circuit Judge) in United States v. Dorfman, 53 F.R.D. 477 (S.D.N.Y. 1971), there was no intention on the part of the draftsmen of the amended Federal rules on discovery to include in Rule 16 what Congress intended to be covered by 18 U.S.C. § 3500.

Defendants also argue that they are entitled to these statements under Brady v. Maryland, 373 U.S. 83 (1963), on the theory that the statements might contain some exculpatory material in favor of the defendants. The government has stated that it is aware of its obligations under Brady and will comply with them. Under such circumstances, the Second Circuit in United States v. Crisona, supra, 416 F.2d at 116, has asserted that

> the assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing of materiality and usefulness.

To the same effect are United States v. Evanchik, 413 F.2d 950 (2d Cir. 1969), and United States v. Cobb, 271 F.Supp. 159 (S.D.N.Y. 1967).

The motion is accordingly denied.

SO ORDERED.

Dated: Brooklyn, N.Y.,
March 1, 1977.

John R. Bartels
United States District Judge

United States Department of Justice

UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

WA:TRP:om

March 2, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic, et al.
76 CR 602

Dear Judge Bartels:

It has come to our attention that the case of the People of the State of New York v. Busic, et al., has been set for trial in New York County for March 7, 1977. This date was apparently set on March 1, 1977 not withstanding the fact that the trial of United States v. Busic, et al., 76 CR 602, has been set for trial in this court for March 14, 1977, which date was set on February 3, 1977.

Accordingly, we request that Your Honor deem this letter as a motion requesting the relief sought in the enclosed order.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: /S/

Thomas R. Pattison
Deputy Chief, Criminal Division

Enc.

cc: All Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT and MARK VLASIC,

Defendants.

- - - - - - - - - - - - - - - - - - X

ORDER

76 CR 602

The trial of United States v. Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic, 76 CR 602, has been scheduled to begin on March 14, 1977, the defendants being held in the Metropolitan Correctional Center pursuant to the jurisdiction of this Court. This date was set on February 3, 1977, and certificates of engagement have been issued to counsel. Various pre-trial matters are scheduled to be heard prior to March 14, including March 7th, 1977 and the presence of the defendants is necessary for these proceedings as well as for the trial. Now on motion of the United States Attorney for the Eastern District of New York, it is hereby

ORDERED, that the defendants shall remain at the Metropolitan Correctional Center, New York, New York unless their presence is required in the United States District Court for the Eastern District of New York in connection with the captioned case, and it is further

ORDERED, that no writ or order issued by a judge of any other jurisdiction shall be executed until the trial of the captioned case is concluded.

Dated: Brooklyn, New York
March 2, 1977

/s/

United States District Judge
Eastern District of New York

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of ___________, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
________________________, 19___

United States Attorney,
Attorney for

To:

____
____
Attorney for ____________________

SIR:

PLEASE TAKE NOTICE [illegible]
[illegible]
[illegible] day of
[illegible]
[illegible]
[illegible]
Dated: Brooklyn, New York,
, 19

United States Attorney
Attorney for

To:
____
____
Attorney for ____________________

Criminal Action No. 76 CR 602

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

—Against—

ZVONKO BUSIC, et al

ORDER

DAVID G. TRAGER
United States Attorney
Attorney for E.D.N.Y.
Office and P.O. Address
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
is hereby admitted.

Dated: , 19

Attorney for

BARTELO, J.
330-7536

DGT:PRS:ms UNITED STATES DISTRICT COURT
F. 763,251 EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

- against - : **O R D E R**

ZVONKO BUSIC, :

Defendant : 76 CR 602

- - - - - - - - - - - - - - - - - - - x

The defendant, ZVONKO BUSIC, has given notice, pursuant to Rule 12.2 of the Federal Rules of Criminal Procedure, of his intention to offer expert testimony concerning his mental state as part of his defense to the charges contained in indictment 76 CR 602. The United States Attorney has engaged David Abrahamsen, M.D., to examine the defendant and to report to the United States Attorney his findings concerning the defendant's mental condition. ZVONKO BUSIC is presently incarcerated at the Metropolitan Correction Center, New York, New York.

Therefore, upon the application of the United States Attorney, it is hereby

ORDERED that the Warden, Metropolitan Correction Center, New York, New York, make the defendant, ZVONKO BUSIC, available for examination and interview by David Abrahamsen, M.D., at an appropriate place within said Metropolitan Correction Center.

Dated: Brooklyn, New York
March 14, 1977

s/ John R. Bartels
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------x

UNITED STATES OF AMERICA, :

-against- : 76-CR-602

ZVONKO BUSIC, JULIENNE :
BUSIC, PETAR MATANIC,
FRANK PESUT, :

Defendants. :

-----------------------------x

United States Courthouse
Brooklyn, New York

March 15, 1977
10:20 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

EMANUEL KARR
OFFICIAL COURT REPORTER

THE COURT: Yes. We will take a five minute recess, ladies and gentlemen.

(Recess taken.)

MR. SCHLAM: Your Honor, the next witness is Margo Dennedy.

MARGO DENNEDY, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. SCHLAM:

Q Who do you work for, ma'am?

A I work for the Federal Bureau of Investigation.

Q What is your title with the FBI?

A I am a Special Agent.

(continued next page)

Q For how long have you been a Special Agent?

A Since 1972.

Q Agent Dennedy, I would like to call your attention to September the 12th, 1976, and ask you if you were working on that date?

A Yes, sir, I was.

Q Did you have occasion to meet an individual by the name of Julienne Busic?

A Yes, sir, I did.

Q Do you see Mrs. Busic in the courtroom today?

A Yes.

Q Would you point her out, please?

A The woman over there with the long blonde hair.

Q Agent Dennedy, at approximately what time did you meet Mrs. Busic for the first time on September 12th?

A Approximately 5 P.M. in the evening.

Q Where was it that you met her?

A Front of 201 East 69th Street.

Q Is that address the New York office of the FBI?

A Yes.

Q And will you tell us, please, what happened when you first encountered Mrs. Busic?

A I met Mrs. Busic at the front door and immediately escorted her to the nurse's office located on the

15th floor of the same building.

Q And what happened when you arrived at the nurse's office at the New York office of the FBI?

A I identified myself to Mrs. Busic, told her the crime that she was being charged with, and advised her that she was going to have to be searched.

Q Now, did you conduct the search of Mrs. Busic?

A, Yes, sir, I did.

Q That was in the nurse's office?

A Yes, sir.

Q And thereafter, after completing the search, did you say anything to Mrs. Busic? In other words, what happened after you completed the search?

A After I completed the search, she was taken downstairs. Before the search was initiated and while it was going on, she was advised of her rights.

Q Now, when you say she was advised of her rights, could you tell us, to the best of your recollection, specifically what was said to Mrs. Busic?

A I took the card -- a small replica of the FD 395 form which sets forth certain of her constitutional rights from my credential case and read them orally to Mrs. Busic.

Q Do you have such a card with you today?

A I have the same card with me, sir.

Q Okay.

MR. SCHLAM: May I have this marked for identification, please?

THE COURT: Yes.

THE CLERK: Statement of rights card marked Government exhibit 2 for identification for the purpose of this suppression hearing.

THE COURT: No, it is more than 2, isn't it?

MR. SCHLAM: I think it's 3.

THE CLERK: It is only 2.

THE COURT: No. We had two forms, did we not?

THE CLERK: The other ones --

MR. SCHLAM: They are defendants' exhibits.

THE COURT: All right, I think he is right.

Q Now, Agent Dennedy, would you take a look, please, at what has been marked as Government's exhibit 2 for identification, and tell us if that is the card from which you read to Mrs. Busic.

A Yes, sir, it is.

Q And there is various writing on there.

Would you tell us what writing on that card was read by you to Mrs. Busic in the nurse's office on September 12, 1976?

A In its entirety?

Q Yes.

A Before we ask you any questions you must understand your rights. You have the right to remain silent Anything you say can be used against you. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning. If you cannot afford a lawyer, one will be appointed for you. Before any questioning, if you wish, if you decide to answer questions without a lawyer present, you would still have the right to stop answering at any time.

You also have the right to stop answering at any time until you talk to a lawyer.

Q Now --

MR. SCHLAM: Your Honor, I'm going to offer exhibit number 2 into evidence.

MR. RUDOLPH: No objection.

THE CLERK: Government exhibit 2, previously marked for identification, received into evidence.

Q Agent Dannedy, thereafter, you say you left the nurse's office, correct?

A Yes, sir.

Q Where did you go?

A I escorted Mrs. Busic along with two other agents down to the 7th floor, the north end of the building, where a room had been set aside for questioning.

Q Now, did you enter the room with Mrs. Busic and the other two agents?

A Yes, sir, I did.

Q Tell us, please, what happened.

THE COURT: Who are the other two agents?

THE WITNESS: Charles Foley and Thomas Quinn.

Q Tell us, please, what happened upon your and Mrs. Busic's entering the room along with the other agents that you have just identified.

A Agent Quinn advised Mrs. Busic again of the crimes that she's being charged with. And he took the form -- the large one -- the same form I gave you and advised her of her rights.

Q How did he do that?

A He did that orally and also gave her the paper to read.

Q When you said he did it orally, he read from this particular form?

A Yes, sir, he did.

MR. SCHLAM: May I have this marked for identification, please?

THE CLERK: Advice of rights form dated September 12, 1976, marked Government exhibit 3 for identification for the purpose of the suppression hearii

Q Would you look, please, at Government exhibit 3 for identification and tell us if you recognize it?

A Yes, sir, I do.

Q What do you recognize it to be?

A The same form that was read to Mrs. Busic on September 12th.

Q Now, after the form was read to Mrs. Busic, was the form given to Mrs. Busic?

A Yes, it was.

Q Was she asked to read the form?

A She was asked to read it.

Q Did she read the form or did she appear to read the form?

A Yes. To the best of my recollection, she did.

THE COURT: She did not read it out loud, did sh

THE WITNESS: No.

Q Was she asked whether she understood the items that appear on that form?

A Several times.

Q What was her answer?

A Affirmative. She did understand them.

MR. SCLLAM: Your Honor, I offer Government's exhibit 3 for identification into evidence.

MR. RUDOLPH: No objection, your Honor.

THE CLERK: Government exhibit 3 previously marke for identification received into evidence.

Q Thereafter, Agent Dennedy, was Mrs. Busic asked questions concerning the crimes with which she had been charged

A No, sir, she was not.

Q What happened?

A Mrs. Busic said that she did not wish to answer any questions until she had spoken to an attorney.

MR. SCHLAM: Your Honor, I have nothing further.

THE COURT: Very well.

CROSS-EXAMINATION

BY MR. RUDOLPH:

Q Good morning, Agent Dennedy.

A Good morning.

Q Agent, when you first observed Mrs. Busic on September 11th, that was approximately 5:10 P.M.?

A On or thereabouts. To the best of my recollectic

Q That was actually at the FBI office in New York City?

A Right in front of the building.

Q In other words, you were not out to the airport?

A No, I was not.

Q In whose custody was she in when you first observed her?

A Tom Quinn and , to the best of my recollection, Charles Foley and Frank Jewels.

Q Are they all special agents?

A They are all special agents, yes.

Q How would you describe her physical condition when you first observed her on September 12th?

A Tired.

Q Did she in fact tell you at one point that she was fatigued or tired?

A Yeah. I am sure she did say it.

Q And did she mention how long she had been without sleep at any point during the course of the evening?

A I think that she mentioned, to the best of my recollection, again, that she hadn't had any sleep from Friday to Sunday.

Q That would be September 10th?

A Right. Two days.

Q Did you ever hear her state during the course of that evening that she was disoriented from lack of sleep?

A Yes, sir, I did.

Q Did she in fact fall asleep at one point with her head on a desk?

A -Yes, sir, she did.

Q Getting back for a moment to the time that she arrived at FBI headquarters, was the nurse downstairs when she arrived inside the building?

Yes, I believe she was.

And the nurse then met her at approximately the same time that you did?

A Yes, sir.

THE COURT: Are there any statements of Mrs. Busic that are going to be offered into evidence?

If not, I don't see the purpose.

MR. SCHLAM: I believe there are. She made certain brief statements. Whether we finally will offer them or not remains to be seen.

THE COURT: I understand, according to Agent Dennedy, that she refused to answer any questions; is that right?

MR. SCHLAM: That's correct. At the interview room. Prior to that point she had made certain brief statements.

THE COURT: That hasn't come out yet, has it? Did you ask her?

MR. SCHLAM: No, sir.

Well, maybe -- should I wait until this is over?

THE COURT: Yes, I think so.

MR. SCHLAM: All right.

Q Now, the nurse was downstairs, correct?

A Yes, sir, she was.

Q And the nurse accompanied you and Mrs. Busic upstairs to her office?

A Along with two other agents, yes.

Q You went up to the nurse's office, correct?

A That's correct.

(continued next page)

Q Was that immediately after she arrived at the FBI headquarters?

A A special elevator had been set aside.

Q Now, you stated that you advised her orally of her rights at that point in time, correct?

A That's true.

Q When she was in the nurse's office --

A Right.

Q (cont.) -- was the nurse present at that time?

A Yes, I believe she was. She was either there in the room itself or she had gone into the bathroom to get her some deodorant or some of the things she asked for.

Q Anybody else present?

A No.

Q Did you ask Mrs. Busic at that point in time to sign the waiver of rights form?

A No. I had no waiver of rights form with me.

Q Now, these rights were read to her while she was being searched; is that correct?

A That's correct.

Q Who was doing the searching?

A I was.

Q So you took out the card contemporaneously to the search?

A Mrs. Busic was merely asked to remove her clothing. It wasn't necessary for me to help her at all.

Q I see. Did you examine the clothing?

A Yes.

Q Now, without getting into what she said, specifically, the substance of your questions at that point related to the possibility of a second bomb having been left in New York City; is that correct?

A That's correct.

Q How many questions did you ask her about that?

A I recall asking her -- the first thing I asked her was whether any other bombs were located in or around New York City that were scheduled to go off.

Q Well, my question is, how many questions altogether did you put to her on that subject? Approximately?

A Maybe the one. Two, the most, when she was asked and she said, no.

Q Fairly brief exchange?

A Right. Definitely.

Q And did you inform anyone at that point of what she had said about the second bombing?

A No.

Q You felt no need at that point to go down to tell the other agents?

A The other agents were right out in the hallway by the elevator. No, at that point I didn't.

Q After you finished inthe nurse's office, you brought Mrs. Busic downstairs to an interview room, correct?

A Right.

Q And it was at that point that Agent Quinn informed her of her rights and showed her the waiver of rights form, correct?

A That's correct.

Q And at that point she indicated that she did not wish to speak to you without the assistance of counsel, correct?

A This is correct. Before she had an opportunity to speak to a lawyer, I think, was exactly what she said.

Q Okay. In any event, she indicated she wanted a lawyer there before she talked to you?

A Right.

Q What time did that occur?

A I guess, to the best of my recollection at approximately 5:25, 5:30 P.M.

Q And did you terminate the interview at that point?

A Yes, I did.

Q Let me ask you this, agent:

Was Mrs. Busic subsequently asked after that point in time by one of the agents to identify some of the luggage that had been used in the hijacking?

A Yes, she was.

Q That took place after she had already requested the assistance of counsel; is that not correct?

A Yeah. I believe it was about after 6:30 that she identified the luggage.

Q After she had already indicated that she didn't went to answer any more questions without a lawyer?

A Yes.

Q Was she also asked to execute a consent to searc form regarding that luggage?

A Yes, sir, she was.

Q That also took place after she had requested the assistance of counsel, did it not?

A Yes, sir, it did.

THE COURT: I can't hear you. You have to speak up.

THE WITNESS: Yes, it did.

Q Was counsel present for her at that time?

A No, sir, to the best of my recollection,.

THE COURT: Well, did she sign any consent to --

THE WITNESS: Yes, she --

THE COURT: (cont.) -- to search?

THE WITNESS: Yes.

MR. RUDOLPH: I have no further questions, your Honor.

THE COURT: All right, next.

REDIRECT EXAMINATION

BY MR. SCHLAM:

Q Agent Dennedy, during the period of time in the nurse's office, you asked Mrs. Busic questions, correct?

A That's correct.

Q And did you ask her questions before or after you advised her of her rights by reading from the card which you have identified and which is marked Government exhibit 2?

A After.

MR. SCHLAM: May I have this marked, please?

THE CLERK: Consent to search form dated September 12, 1976, signed by Julienne Busic, marked Government exhibit 4 for identification for the purpose of the supporession hearing.

Q Now, Agent Dennedy, did you testify as to whether or not Mrs. Busic signed the advice of rights form?

A Yes, I did.

Q Did she or did she not?

A Yes, she did.

Q She signed it.

Now, would you look, please, at what has been marked Government exhibit 4 for identification and tell us if you recognize that?

A Yes. This is the consent to search the luggage.

Q Did she -- How was she advised of the provisions of this particular form?

A I think she was given it to read, again, to the best of my recollection. I can't say with certainty whether it was read to her or not.

Q Did she indicate that she understood?

A Yes, sir, she did.

Q Did she thereafter sign it?

A Yes, sir, she did.

Q That was in your presence, ma'am?

A Yeah.

Q Approximately what time was the form signed by her?

A 6:30 P.M.

MR. SCHLAM: Your Honor, we are going to offer exhibit number 4 into evidence.

MR. RUDOLPH: May I see the advice of rights form, please?

I have no objection, your Honor.

THE COURT: Let me look at it. May I?

MR. SCHLAM: Yes, sir.

THE CLERK: Government exhibit 4 previously marked for identification received into evidence.

Q Would you look, please, at the advice of rights form marked exhibit 3 and tell us whether or not Mrs. Busic signed that form?

A No, sir, she didn't.

MR. SCHLAM: Okay, thank you.

THE COURT: What is the advice of rights form? Let me see that, too.

Oh, I see.

MR. SCHLAM: We have nothing further.

MR. RUDOLPH: Just a couple of questions.

(continued next page)

MR. SCHLAM: Nothing further.

RECROSS EXAMINATION

BY MR. RUDOLPH:

Q Just so we get the sequence straight in the record, Agent Dennedy, is this the advice-of-rights form that was given to her by --

A Agent Quinn.

Q (C ontinuing) -- by agent Quinn?

A Right.

Q And that was at what time?

A About 5:25, 5:30.

Q And at the point in time that she was given it at about 5:30 she refused to sign it?

A Right.

Q And she refused to answer any further questions or to speak to you without a lawyer?

A Regarding the hijacking, yes.

Q That is correct.

And this consent form that was signedby her at 6:30-- is that correct?

A Yes.

Q There was no lawyer present at that time that she was asked to sign this?

A No, sir, there was not.

Q Thank you.

MR. SCHLAM: Excuse me, your Honor:

I had intended to offer the search part of this thing separately, but I think since we have agent Dennedy, and with consent of counsel we might as well finish that up now.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. SCHLAM:

Q Agent Dennedy, you described certain suitcases which Mrs. Busic identified or certain luggage which Mrs. Busic identified at the time in F.B.I. Headquarters; is that correct?

A Yes.

Q Now with relation to the consent-to-search form, when did she -- what happened, what happened with respect to these suitcases, in other words what was the chain of events with respect to the suitcases at your headquarters?

A I didn't see any of the luggage come in, when she came out of the processing room after she had been fingerprinted and the photographs were taken, there was a pile of luggage on the desk as you come out of the room and to the best of my recollection she picked out -- I think definitely one, possibly two pieces of carry-on luggage and identified them as hers and she was looking through for stuff, cosmetics or something that she might need to take.

Q And at whatpoint with respect to the luggage was she out to consent to the search.

A Right then.

Q And thereafter the luggage was searched, after she consented to it?

A I believe so.

It was not searched by me.

Q Very good.

MR. SCHLAM: That concludes our questions of this witness, your Honor.

THE COURT: Very well.

MR. RUDOLPH: May I just have a minute?

I haven't anticipatelgoing into this.

(Mr. Rudolph then conferred with Mr. Asen.)

MR. RUDOLPH: Just a couple of questions, agent.

RECROSS-EXAMINATION

BY MR. RUDOLPH:

Q Again to clear up the time, she signed the consent-to-search form at approximately 6:30?

A Yes.

Q And do yourecall what time she was asked to identify the luggage?

A To the best of my recollection it was when we came out of the fingerprint room.

Q Well --

MR. RUDOLPH: Do you mind if we have this marked?

MR. SCHLAM: No.

MR. RUDOLPH: Could we have this marked, please?

THE CLERK: Two page document, log, dated September 12, 1976, marked as defendant's exhibit E for identification, for purposes of this suppression.

THE COURT: Let me see it.

Let me see it.

(Document handed to the Court.)

THE COURT: All right.

Very well.

(The document was returned to Mr. Rudolph.)

Q Do you recognize what has been marked as defendant's exhibit E for identification?

A Yes.

Q And could you read through that --

THE COURT: You will have to speak louder.

A Yes.

Q Would you tell me if that refreshes your recollection as to when she was asked to identify the luggage?

A It says here between 7:06 and 8:06 she was asked to identify the luggage.

THE COURT: What does the log say [illegible] it in evidence?

MR. RUDOLPH: No, your Honor.

THE COURT: Then you shouldn't have asked the question until it was in evidence.

MR. RUDOLPH: I merely asked whether it would refresh his recollection.

THE COURT: Why don't you offer it?

You have no objection, do you?

MR. SCHLAM: No objection, your Honor.

MR. RUDOLPH: I will offer it.

THE COURT: Offer it in evidence.

What does it say about the time she signed the consent?

MR. RUDOLPH: That is not listed in that.

THE COURT: It is not listed there?

MR. RUDOLPH: No, that is only listed on the consent form itself.

THE COURT: I see. Well, what does it say?

MR. RUDOLPH: 6:30, your Honor.

THE COURT: 6:30, then she subsequently signed the consent before she identified the luggage?

MR. RUDOLPH: Correct, correct.

THE CLERK: Document previously marked for identification now received in evidence as defendant's exhibit E.

BY MR. RUDOLPH:

Q Just to pick up on his Honor's point, she signed the consent form at least thirty-six minutes before she identified the luggage: Correct?

A I put it simultaneous when walking out of the interview room.

There were a few people, I was in andout of this room intermittently, and then Agent Quinn took her again. I can't answer further but when we walked out of the interview room at approximately 6:30 P.M. she signed that form at that point and she indicated the stuff and I then asked her whether she needed anything and she indicated in the carry-on luggage.

Q But you don't recall her signing the form?

A I don't, but again I was in and out of that room.

Q Now at the time that she looked at that luggage, she had already asked for an attorney to be present?

A Yes.

Q Was the attorney present at that point?

A No.

THE COURT: I think we covered it before.

MR. RUDOLPH: We covered it as to the consent to search form, I just wantedto carry it further to the identification of the luggage.

BY MR. RUDOLPH:

Q When she identified the luggage, did she just identify it in general, certain pieces of luggage, or did she identify certain pieces of luggage, the items within the luggage?

A Well, I recall definitely that there was one, possibly two pieces of carry-on luggage, it was a comb or some stuff like that in one of them, I recall her going through looking for something.

Q In otherwords, the identification was just of an outside physical piece of luggage?

A To the best of my recollection, yes.

MR. RUDOLPH: May I have a moment, your Honor?

THE COURT: Yes.

BY MR. RUDOLPH:

Q Just one or two more questions:

Do you recall how she was asked to identify it, what was said to her and who said it?

A No.

Q Were you present at that time?

A Yes, but I can't recall the exact words.

Q Could you give me the substance of what was said?

A "Which of these pieces are yours," possibly.

Q And in response to that, she pointed then out?

A Yes, yes.

Q Thank you.

A You are welcome.

THE COURT: Anything further?

MR. SCHLAM: Thank you.

THE COURT: Very well.

(The witness was excused.)

(continued next page)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 76-CR-602

ZVONKO BUSIC, JULIENNE :
BUSIC, PETAR MATANIC,
FRANK PESUT, :

Defendants. :

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United States Courthouse
Brooklyn, New York

March 16, 1977
10:00 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
BARRY SCHULMAN, ESQ.
EDWARD KORMAN, ESQ.

MICHAEL TIGAR, ESQ.
-and-
PIERCE O'DONNELL, ESQ.
Attorneys for Zvonko Busic

DAVID RUDOLPH, ESQ.
-and-
MICHAEL ASEN, ESQ.
Attorneys for Defendant Julienne Busic

MARTIN ELEFANT, ESQ.
PAUL BERGMAN, ESQ.
Attorneys for Defendant Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Pesut

Also present:

BORIS MARUNA
Official Croatian Interpreter

MR. ROCHMAN: He said it was an accurate recording of what he had said. Yes, I did introduce that into evidence, your Honor.

THE COURT: All right. Now, what is the next step?

MR. SCHLAM: We have nothing further on the Pesut statement, your Honor.

MR. ROCHMAN: All right.

Your Honor, we call Professor Derbyshire.

WILLIAM DERBYSHIRE, called as a witness, having been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. ROCHMAN:

MR. ROCHMAN: May I proceed, your Honor?

THE COURT: Please do.

Q What is your present occupation, Mr. Derbyshire?

A At the present time I am a professor of Russian language, Slavic language, Serbo-Croatian and Slavic linquistics at Rutgers and chairman of the Slavic Department at Rutgers University.

THE COURT: Where is that, Newark?

THE WITNESS: No, New Brunswick, your Honor.

Q Are you chairman of the Department of Slavic languages?

A Of Slavic languages and literatures, yes, sir.

THE COURT: Do you have many students taking those courses?

THE WITNESS: About 250 including Polish.

THE COURT: Serbo-Croatian?

THE WITNESS: Yes, about 15 students, which is quite a lot for those students.

THE COURT: All right. Proceed.

Q What is your own educational background, where did you go to school?

A I did all my undergraduate and graduate work at the University of Pennsylvania.

Q What undergraduate and graduate degrees do you have?

A I have a B.A. in Russian Language and Literature, a Master and Ph.D. in Slavic Linguistics.

Q What other teaching positions have you held other than your present occupation?

A I have taught at the State University of New York, State University of New York at Binghamton, Lycoming College, Williamsport, Pa.

Q What did you teach at those universities?

A Russian language, primarily, and Serbo-Croatian.

Q Have you done any writing or research in any of the areas that you have mentioned?

A Yes, I have done considerable research and published in the area of Slavic linguistics specifically on the question of homonymy.

Q Since that word is going to come up again in your testimony, would you describe what a homonym is.

A Homonyms are words in a language which are pronounced the same and have different meanings.

THE COURT: Well, we have homonyms in the English language.

THE WITNESS: Yes, of course, your Honor.

Q And have you had occasion to travel to Yugoslavia during the past fifteen years?

A Yes, several times. I went first as a tourist I studied for one year at the University of -- at the Institute for Linguistics at Zagreb, and I was there again last summer.

Q For how long a period of time?

A Last summer for one month.

Q And is it correct that you both lived in

Yugoslavia and did work there?

A Yes, the longest period of time I lived there was one year.

THE COURT: That's in Zagreb?

THE WITNESS: In Zagreb, yes.

Q What part of the country have you visited when you were either working or in the other capacity?

A I lived primarily in Zagreb, but I visited all the republics of the country.

THE COURT: Will you tell the Court, while you are speaking, just what portion of Yugoslavia was formerly Croatian?

THE WITNESS: Croatia was one of the six republics of which Zagreb is the capital and that's where I lived.

THE COURT: That's the capital of the Republic of Croatia?

THE WITNESS: The Republic of Croatia, yes, and there are five other republics besides.

THE COURT: Yes, I understand, and I know that all of them are called Yugoslavia.

THE WITNESS: Those six republics form Yugoslavia, these are to some extent autonomous and yet dependent on one government.

THE COURT: Serbia, Belgrade is the capital?

THE WITNESS: Of the Serbic Republic, and of the country, yes. It is the political capital, and it is also the capital of the Serbic Republic.

Q Professor, are you yourself of Yugoslavian descent?

A No, I have no slavic blood whatsoever.

Q Are any of your relations of Yugoslavic --

A No

Q Were you born in the United States?

A I was born in Philadelphia.

Q Do you have any affiliation, political or otherwise, with the movement for Croatian self-determination?

A No, I have no such affiliations.

Q Prior to testifying or becoming involved as a witness in this case, have you had any contact with anyone connected with the movement for Croatian self-determination?

A No, none whatsoever.

Q You and I met for the first time when?

A On January 29.

Q Professor Derbyshire, what is Serbo-Croatian?

A Serbo-Croatian is an umbrella term for the various languages, or, if you wish, dialects of Yugoslavia. There is no such language as Serbo-Croatian. It's used to refer to a conglomerate of dialects.

Q And--

A When one writes for instance, whether it be literature or in the newspapers, that language is called Serbo-Croatian, one writes in one of the variants, it's the Serbian or Croatian variant, but there is a language called Serbo-Croatian; that is a generic term used to refer to the various dialects of variants spoken throughout Yugoslovia of that umbrella language.

Q You mentioned the word "variance." There was a Croatian variant and it is a--

A I referred to these as variants.

Q What does that mean?

A All right. For me, this has the meaning of not a complete, separate language status, but of two varying forms of the same language. There is mutual comprehension at the same time, but it is not an identical language.

THE COURT: Sometimes referred to, though?

THE WITNESS: Yes, it is normally referred--

THE COURT: Could refer to Croatian language alone or Serbian language alone?

THE WITNESS: Yes, indeed there is -- I prefer to call it not a language but there is a Croatian -- I prefer the term variant.

The Croatian variant and the Serbo variant --

Q There is not a language called Serbo-Croatian?

A That's right.

Q There is a variant Croatian and Serbo variant?

A Yes.

Q With respect to the Serbo variant, are there different dialects of the Croatian variant?

A Yes, even in Croatian there are major dialects; here I use the word dialects.

Q How many such dialects?

A There is the Croatian literary form, the Croatian literary language; this is the language which you will find in newspapers, in literature written in Croatian.

Above that there are two significantly different dialects; one spoken in one of the inland regions called Karkavian.

Q And that is the--

A This is spoken inland in and around Zegreb, over a sizable area.

In addition to Karkavian, a second dialect within Croatian would be Chakavian.

Q What is the region in which that last dialect

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA :

-against- :

ZVONKO BUSIC, JULIENNE BUSIC, : 76-CR-602
PETAR MATANIC, FRANE PESUT
and MARK VLASIC, :

Defendants. :

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BARTELS, District Judge

MEMORANDUM-DECISION and ORDER

Each of the above-named defendants has moved pursuant to Rules 5, 12 and 41 of the Federal Rules of Criminal Procedure for suppression of statements made by them to the F.B.I. agents essentially upon the grounds that they were (1) involuntary, (2) obtained in violation of the McNabb-Mallory rule and Rule 5(a), F.R.Crim.P., and (3) obtained in violation of 18 U.S.C. §3501(b) and also because such statements were obtained when counsel should have been previously assigned.

On September 10, 1976, the defendants and one Mark Vlasic (who has been removed from the case by a plea of guilty) boarded at LaGuardia Airport a TWA flight No. 355, containing 86 passengers and 7 crewmen, which departed from LaGuardia Airport about 7:45 P.M. destined for O'Hare Airport, Chicago, Illinois. Shortly after take off the defendants hijacked the plane to enforce compliance with their demands regarding "Croatian independence." Accordingly the plane was diverted to Montreal, Canada, and again to Gander, Newfoundland for refueling, at which latter place 33 passengers were permitted to deplane. Thereafter the plane made another stop at Iceland and then proceeded to Paris, France.

Pursuant to information given to the captain of the plane while in flight by the hijackers and relayed to the Federal Bureau of Investigation and the New York police, a bomb was removed from a locker at the Grand Central Station, New York, and upon testing by the police on September 11, 1976, officer Brian Murray was killed when the bomb exploded. In their demand note the hijackers stated that if their demands were not met, "a second timed explosive device, which is likewise in a highly busy location, shall be activated."

The hijackers maintained control of the plane until Sunday, September 12, 1976, when at about 3 A.M. after the plane had arrived in Paris, the hijackers surrendered to the French police. Thereafter the hijackers were flown to Kennedy Airport, New York, aboard a French Military plane and landed about 3:30 P.M. on Sunday, September 12, 1976. Subsequently, about 4 P.M., custody of the hijackers was transferred to the F.B.I. agents who arrested them and advised them of the charges against them and also of their "Miranda" rights either then or in the car on their way to 69th Street. They were then transported by car to the F.B.I. headquarters on 69th Street, Manhattan, New York.

Upon arrival at the F.B.I. headquarters each defendant was taken into a separate interview room and again advised of his "Miranda" rights. The interviews began at about 5:15 P.M., the interview of Zvonko Busic terminating about 10 P.M., that of Julienne Busic about 6:45 P.M., that of Petar Matanic about 8:50 P.M., and that of Frane Pesut at 10:30 P.M.

The defendants were then transported at various times to the Metropolitan Correctional Center for overnight lodging, Zvonko Busic arrived about midnight, Julienne Busic about 9 P.M., Petar Matanic about 10:15 P.M., and Frane Pesut about 11 P.M. The following day, September 13, 1976, the defendants were taken by car from the Metropolitan Correctional Center to the Eastern District of New York courthouse where they were arraigned about 11 A.M.

Discussion

All the defendants vigorously charge that the delay in their arraignment violates the McNabb-Mallory rule as well as section 3501 of Title 18 of the United States Code primarily because the statements were made by them more than six hours after they were taken into custody, emphasizing that they were arrested in France at 3 A.M. on Sunday, September 12, 1976, and again taken into custody in New York on the same day about 4 P.M., a time lapse of approximately 12 hours from the first arrest.

We do not believe that the custody for the purpose of this suppression hearing should begin running until the defendants were arrested at the Kennedy Airport and that any delay caused by the French custody can hardly be charged to the Government. However, in the last analysis the real test of whether any defendants' statements are admissible is one of voluntariness. See 18 U.S.C. §3501 and United States v. Collins, 462 F.2d 792, 796 (2d Cir.), cert. denied, 409 U.S.

988 (1972). In applying this test the critical period is the time between the arrest and the time the statement or confession is made. United States v. Mitchell, 322 U.S. 65, 69-71 (1944); United States v. Seohnlein, 423 F.2d 1051 (4th Cir.), cert. denied, 399 U.S. 913 (1970). It has also been held that the delay caused by overnight detention which was due to the unavailability of a committing magistrate when the arrest occurs at a late hour or after the beginning of a weekend or holiday is reasonable. United States v. Ortega, 471 F.2d 1350 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973); United States v. Marrero, 450 F.2d 373 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972); United States v. Collins, supra.

Section 3501(b), 18 U.S.C., sets forth specifically the factors that must be considered by the trial judge in determining the issue of voluntariness which, in accordance with the section, depends upon "all the circumstances surrounding the giving of the confession," which naturally include those circumstances not specified in the section. Moreover, the presence or absence of any of those factors need not be conclusive upon the issue of voluntariness. One of the most important circumstances which the Government had to consider in interrogating these defendants was the information relayed to the Government in the demand note. The hijackers specifically stated that if their demands were not met a second timed explosive would be activated. This statement made it imperative that the Government agents question the defendants immediately upon arrest, which I find under the circumstances they did. In this connection one should note that section 3501(c) also provides that the time limitation of six hours need not apply where the delay beyond that period is found to be reasonable considering the means of transportation and the distance to be travelled to the nearest available magistrate. Delay alone is not sufficient under the statute to establish involuntariness.

After hearing all the testimony of the Government agents and the evidence adduced by the defendants, the court has carefully considered and weighed all the factors set forth in 18 U.S.C. §3501, as well as the McNabb-Mallory rule, in determining the voluntariness of the statements made by each defendant to the Government agents. At the same time the court has considered the evidence relative to the identification of one of the defendants and the search and seizure of the Busic apartment at 303 West 76th Street, Manhattan, New York, and also the search of Julienne Busic's luggage. In so doing the court realizes that before interrogation of the defendants were in custody since the French arrest and consequently upon their arrest at the Kennedy Airport they suffered a certain amount of fatigue, but this fatigue was not due to any action on the part of the Government or its agents in New York. Nevertheless the defendants question whether they should have been interrogated before a lawyer was appointed. But considering the exigencies and necessities arising from the circumstances, the Government agents were required to question the defendants immediately. After evaluating the credibility of all the witnesses and weighing all the pertinent factors this court finds that the statements of each defendant made to the Government agents were voluntary and not the result of psychologically coercive or third degree tactics. A brief reference to those statements follows.

Zvonko Busic

He was read his rights, he understood his rights and he had signed an advice of rights form. He claimed he was exhausted and tired and that he told the F.B.I. agent five times that he had not slept for 125 hours and that he was told that he must nevertheless answer the questions. The court finds that he did not ask for a lawyer, that he was not intimidated, that his statements were voluntary and are admissible.

Julienne Busic

This defendant was advised of her rights and after receiving the advice of rights form, she refused to sign it or to answer any questions until she had a lawyer. She was tired and, in fact, fell asleep. About one hour later she was asked to identify her luggage and did so and then signed a consent to search the same. The court finds that after she had refused to answer any questions or to sign the advice of rights form and had requested a lawyer, her subsequent identification of luggage and her waiver to search the same was involuntary and the results thereof will be suppressed.

Petar Matanic

This defendant was read his "Miranda" rights and he understood the same. But he claimed that he asked for a lawyer, that he was intimidated and that he was told that he had to answer questions; that he believed this to be true since he was badly treated by Yugoslavic police in the past. The Government agents deny any such threats and do not recall any request for any lawyer. In fact, the agents testified that Matanic was willing to speak freely. The court has examined Matanic's subsequent testimony before Assistant District Attorney Tanenbaum where Matanic unquestionably did ask for a lawyer after the examination by the F.B.I. Counsel argues that this request indicates that Matanic made the same request before the F.B.I. The court disagrees. In the first place, the request cuts both ways as far as it bears upon any request made at the prior hearing before the F.B.I. agents. In the second place, Mr. Tanenbaum subsequently asked Matanic twice if he was willing to answer questions without a lawyer and Matanic replied in the affirmative. The court finds that Matanic's statements were voluntary and are admissible.

Frane Pesut

At this defendant's hearing Sergeant John C. Derdak of the F.B.I. was called in as an expert in Serbo-Croatian language, although Pesut could understand and speak some English. The agents read Pesut his rights in that language and Pesut said he understood his rights and, indeed, signed a waiver thereof, witnessed by two of the agents. He was questioned in Serbo-Croatian and he stated that he wanted to talk because he claimed his offense was a political act and not a criminal act. Pesut was questioned by Derdak for approximately three hours and to all the agents present Pesut appeared to be cooperative and at no time indicated that he did not understand. In rebuttal, counsel for Pesut placed on the stand William Derbyshire, a Rutgers University professor in Russian, Serbo-Croatian and Slavic languages. He testified that there were various Croatian dialects which were variants and that after studying Sergeant Derdak's translation into Croatian of the rights form in order to test Derdak's ability to converse or translate from English into Croatian and vice versa, he was of the opinion that Derdak could not possibly have acted as an effective interpreter to Pesut or to have properly translated questions posed to Pesut and answers made by him. However, the professor, while very scholarly and knowledgeable of the Serbo-Croatian language, had not established a sufficient foundation for his opinion. He never questioned Pesut as to his understanding of his rights or as to Pesut's understanding of the questions and his answers to the interrogation of the F.B.I. He apparently gave no consideration to the fact that Pesut answered questions for three hours without indicating to any of those present any lack of understanding. Upon balance, therefore, the court must disregard the professor's opinion-testimony as being without proper foundation. The court finds that Pesut understood his rights, that he waived them and that all statements made by him were voluntary and are admissible.

At the hearing counsel for Pesut also objected to the identification of Pesut made by Charles Gore and Georgio Bracaglia. They testified that they saw Pesut in the Grand Central Station on September 8, 1976, at about 1:15 A.M., asking them about the safety of the Grand Central lockers. Identification was made by means of photographs and a lineup. The court finds the identification in all respects proper and untainted.

Search of Busic premises at 303 West 76th Street, Manhattan, New York

Predicated upon the information from the captain of the hijacked plane, the New York Police Department on September 11, 1976, at 10:30 A.M., began an all around-the-clock surveillance of the Busic apartment at 303 West 76th Street, Manhattan, which finally ended at 7:15 P.M. on September 12, 1976, when with a search warrant signed by Mr. Justice Roberts of the state Supreme Court, the police broke into the apartment and searched the premises. There was considerable testimony by all the detectives who surveilled the premises as to those who entered and left the premises. After entry of the apartment pursuant to the warrant, a photographer from the Police Department took a number of pictures. This was on September 12, 1976. However, the stamp on the back of the photographs taken indicated that in the date gap September 11th had been filled in, which raised a question whether the search was made before the warrant was issued. The evidence was clear that this was a mistake and that the date of September 12th should have been inserted at the proper place. Furthermore, all the testimony clearly indicates that there was no search and seizure of the premises before 7:15 P.M. on September 12, 1976. The search was legally made pursuant to a valid search warrant and all photographs and other items taken from the apartment will not be excluded on the ground that the search was invalid.

SO ORDERED.

Dated: Brooklyn, N.Y.,
March 21, 1977.

John R Bartels
United States District Judge

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

DGT:ERK:rb
F. #763251

March 21, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic
76 CR 602

Dear Judge Bartels:

I enclose herewith a statement and stipulation of the United States Attorney, pursuant to Title 49, U.S.C., Section 1473(c)(2). Mr. Trager has there stipulated that "none of the aggravating factors set forth in paragraph (7) [of the aforesaid statute] exists." Since Section 1473(c)(1) provides that "[a] person shall be subjected to the penalty of death for any offense prohibited by section 1472(i) *** of this title only if a hearing is held in accordance with this subsection" and since such a hearing cannot be held because of the stipulation, any conviction will not be for a capital offense. Accordingly, the various procedures which normally apply to such offenses are inapplicable. Hall v. United States, 410 F.2d 653, 660-661 (C.A. 4, 1969), certiorari denied, 396 U.S. 835; United States v. Hoyt, 451 F.2d 570 (C.A. 5, 1971), certiorari denied, 405 U.S. 995; United States v. McNally, 485 F.2d 398 (C.A. 8, 1973), certiorari denied, 415 U.S. 978; Loux v. United States, 389 F.2d 911 (C.A. 9, 1968), certiorari denied, 396 U.S. 867; see, also, United States v. Crowell, 359 F.Supp. 489 (D.C. Fla. 1973), affirmed, 498 F.2d 324 (C.A. 5, 1974); United States v. Collins, 395 F.Supp. 629 (D.C. Pa., 1975); Carter v. United States, 388 F. Supp. 1334 (D.C. Pa., 1975), affirmed 517 F.2d 1397 (C.A. 3, 1975).

In a letter dated March 18, 1977, Mr. Bergman outlined the defendants' position that "this case would not lose its 'capital' character because of the absence of a possible death penalty" and stated that "[t]he case which supports that position is U.S. v. Watson, 496 F.2d 1125 (4th Cir. 1973)." Of course, given some of the absurd arguments that have already been put forward, this claim is not surprising.

Mr. Bergman's letter neglects to point out that the case upon which he relies, a 2-1 decision, is an aberration even in the Fourth Circuit which decided it (compare, Hall v. United States, 410 F.2d 653, 660-661 (C.A. 4, 1969), and, in any event, the case is distinguishable. The panel in United States v. Long, supra, was concerned with a statute which provided that upon conviction, the death penalty shall be imposed unless the jury qualified its guilty verdict by adding thereto "without capital punishment" [18 U.S.C. §1111 (1970 ed.)].

Although the Supreme Court declared the death penalty unconstitutional, the panel in Long reasoned - contrary to every case that has denied the issue - that in a literal sense the offense defined in former Section 1111 was a capital offense because, upon conviction of the offenses alleged in the indictment, it authorized the death penalty.

In the present case, however, the conviction for the offense alleged in the indictment could not without more result in the imposition of the death penalty; additional facts must be proven at yet a second trial. Since the stipulation of the United States means there will be no further proceedings to determine whether additional aggravating circumstances warranting the imposition of the death penalty are present, the case has clearly losts its "capital character", to use Mr. Bergman's words. See, United States v. Poitras, 339 F.2d 428 (C.A. 4, 1964).

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

Edward R. Korman

By: EDWARD R. KORMAN
Chief Assistant
United States Attorney

Enc. a/s

cc: All counsel

DGT:ERK:rb
F. #763251

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,

Plaintiff,

-against- 76 Cr. 602

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,
and MARK VLASIC,

Defendants.

- - - - - - - - - - - - - - - - - - - -x

STATEMENT AND STIPULATION OF UNITED STATES ATTORNEY, DAVID G. TRAGER, PURSUANT TO 49 U.S.C. § 1473(c)(2)

Section 1472(i)(l) of Title 49 provides that "[w]hoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished:-

(A) by imprisonment for not less than 20 years, or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life."

Section 1473(c)(i) provides, however, that a person shall be subject to the penalty of death *** only if a hearing is held in accordance with this subsection" to determine if there are any mitigating circumstances which would preclude imposition of the death penalty and, if no such mitigating circumstances are present, to determine whether one of five aggravating circumstances are present which would compel the imposition of the death penalty. Should the jury find that none of the five aggravating circumstances are present, then the death penalty could not be imposed.

While the determination whether mitigating or aggravating circumstances are present is a question for the trier of fact, Congress has vested the United States Attorney with certain responsibility in determining whether the issue should be presented to the jury. Section 1473(c)(2) provides that the hearing on this issue "shall not be held if the Government stipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists."

The decision to so stipulate, of course, may be put off until after the trial on the issue of guilt or innocence. Indeed, it should be put off if there is a possibility that the trial may produce evidence which will establish the absence of mitigating circumstances or the presence of aggravating circumstances. Where, however, it is plain that evidence legally sufficient to justify the imposition of the death penalty will not be adduced, then it is the obligation of the United States Attorney to say so, lest he put all of the parties, particularly the defendants, through the ordeal of a trial in which the lives of the defendants hang in the balance.

My initial inclination, when the indictment was returned, only ten days after the offense, was to await the trial and the verdict of the jury on guilt or innocence before making my decision whether to ask that the issue of the death penalty be put to the jury.

I have, since then, had the benefit of carefully reviewing all the evidence against each of the defendants as well as extensive research and thought on the criteria Congress has imposed. I have concluded that the evidence taken in the light most adverse to the defendant would not be legally sufficient to establish beyond a reasonable doubt the presence of any of the aggravating circumstances which Congress has described as a precondition to the imposition of the death penalty.

The consequence of this stipulation will mean that the death penalty may not be imposed. Because I believe that the decision whether to seek the death penalty must be a rational and informed one, in accordance with criteria set out in Section 1473, and because I believe that the defendants, the district court and the public are entitled to an explanation for my decision, I shall proceed to set out the reason for it here.

Paragraph 7 of Section 1473 provides:

> "If no [mitigating] factor set forth in paragraph (6) is present, the Court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict *** that --
>
> (A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or
>
> (B) the death of another person resulted from the commission or attempted commission of the offense, and--
>
> (i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a sentence of life imprisonment or death was imposable;
>
> (ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of serious bodily injury upon another person;
>
> (iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or
>
> (iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner."

A. The first aggravating factor is by its literal language present here, because the death of Police Officer Murray occurred "after the defendant[s] had seized or exercised control of the aircraft." We have been instructed, however, by the Supreme Court that statutes may not be literally construed to reach unreasonable results plainly at variance with the policy of legislation as a whole. United States v. American Trucking Co., 310 U.S. 534, 543 (1940); J.C. Penney Company v. Commissioner of Internal Revenue, 312 F.2d 65, 68 (C.A. 2, 1962). This should be particularly true where human life hangs in the balance.

Paragraph 7(A) of Section 1473(c) which makes a post-seizure death an aggravated offense was drafted by the Department of Justice; its purpose was described in a letter dated May 30, 1974, from W. Vincent Rakestraw, Assistant Attorney General for the Office of Legislative Affairs, to Representative Peter W. Rodino, Chairman of the House Judiciary Committee. There, Mr. Rakestraw said that the purpose of a provision like that incorporated in paragraph 7(A) was to deter the killing of the passengers after the hijackers had control of the aircraft. The provision was drafted in response to an argument that if the death penalty is mandatory where the hijackers had caused a death in their efforts to gain control of the aircraft, there would be no incentive for them to spare the lives of their hostages after they were in control of the plane.

Mr. Rakestraw explained, however, that this concern may be met - and, indeed was met, by paragraph 7 (A), which provides that a killing in the course of a kidnapping or hijacking would constitute an aggravating factor only if the killing occurred after the offenders assumed control of the hostages. Mr. Rakestraw continued that:

> "This concern could be met, however, simply by modifying the provisions of S. 1401 [a related Senate bill] so that a killing in the course of a kidnapping or highjacking would constitute an aggravating factor only if the killing occurred

> subsequent to the offender's assuming control over the hostages. Such a modification would minimize any arguable difficulty with the bill as originally drafted, and would avoid the serious problems carried by the Senate amendment. It has already received the approval of the House of Representatives in the course of its 361 to 47 vote in favor of H.R. 3858; that bill, in making amendments to the Federal Aviation Act of 1958, included, inter alia, a provision tailoring the capital punishment provisions of S. 1401 to the specific offense of aircraft highjacking and adopting the specific approach outlined above. This approach previously approved by the House of Representatives is clearly the preferable one."

The death of Police Officer Murray in the present case is clearly not the type of post-seizure death which Congress had in mind as an aggravating factor. The bomb was not a time bomb; it was not set to go off, and the timing of the explosion was fortuitous. Indeed, the application of paragraph 7 (A) to circumstances such as those present here could create much the same problem that Congress was trying to avoid. If the death penalty is mandatory merely because of the fortuitous timing of an explosion which may not have been intended, then defendants still in control of an aircraft would have no incentive to spare the lives of their hostages if they were somehow to learn of the death.*

In sum, although Section 1473(c) of Title 49 is literally applicable, the death of Officer Murray here is plainly not the kind of post-seizure death which Congress intended should be punished by the death penalty.

B. Three of the four subdivisions of paragraph 7(B) are so clearly inapplicable that they require no discussion. Neither of the defendants has been convicted of another offense for which a sentence of life imprisonment or death was imposable, paragraph 7 (B)(i), or which involved the infliction of serious bodily injury upon another person, paragraph 7 (B)(ii); nor was the offense of air piracy committed in an especially heinous, cruel or depraved manner, paragraph 7 (B)(iv).

---

* Here prior to relinquishing control of the aircraft, one of the defendants was permitted to contact other persons on the outside before giving up control of the aircraft.

The only subdivision of paragraph 7 (B) that warrants brief discussion is paragraph 7 (B)(iii) which provides that it is an aggravating circumstance if, in the commission of the offense, "the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or the attempted offense."

The defendants surely created a foreseeable risk of death or injury that warrants the severe penalty of life imprisonment that they are subject to if they are convicted of Count One. United States v. Guillette, 547 F.2d 743, 749 (C.A. 2, 1977). The bomb, however, was not a time bomb; on the contrary, the bomb was not set to explode; and, in fact, the defendants cautioned care in its handling. This is not the "grave risk of death" which homicide statutes carrying the death penalty normally encompass within their scope.

As Arnold Hechtman, former counsel to the Commission on the Revision of the New York Penal Law, observed in his commentary on Section 125.25(2) of the New York Penal Law, which imposes a penalty of fifteen to twenty-five years, for a homicide which occurs when a defendant has engaged in conduct creating a grave risk of death to another person:

> "Subdivision 2 defines the highest crime of reckless homicide, which is very similar to a former Penal Law offense classified as first degree murder (§ 1044[2]). Each version embraces extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness: for example, shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions' cage in the zoo (see People v. Jernatowski, 1924, 238 N.Y. 188, 144 N.E. 497; Darry v. People, supra)."

7. I do not believe that the evidence could establish beyond a reasonable doubt that the circumstances under which the bomb was planted here displayed the depraved kind of wantonness to justify the imposition of the death penalty.

Accordingly, for these reasons, I, David G. Trager, United States Attorney for the Eastern District of New York, stipulate that "none of the aggravating factors set forth in paragraph 7 [of Section 1473(c)(2)] exists."

Dated: Brooklyn, New York
March 21, 1977.

David G. Trager
DAVID G. TRAGER
United States Attorney
Eastern District of New York

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of ____________, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_________________________, 19____

____

United States Attorney,
Attorney for __________________

To:
____
____
____
Attorney for ________________________

SIR:

PLEASE TAKE NOTICE that the within is a true copy of ____________duly entered herein on the ____ day of ________________ ______________, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_________________________, 19____

____

United States Attorney,
Attorney for __________________

To:
____
____
____
Attorney for ________________________

Criminal Action No. 76 CR 602

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA,

Plaintiff,

—Against—

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,
and MARK VLASIC,

Defendants

STATEMENT AND STIPULATION OF
UNITED STATES ATTORNEY,
DAVID G. TRAGER

DAVID G. TRAGER
United States Attorney,
Attorney for U.S.A.
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due [illegible] of a copy of the within ______________is hereby admitted.

Dated: ________________________, 19____

____
Attorney for ____________________

FPI-LC-5M-8-73-7959

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 76-CR-602

ZVONKO BUSIC, JULIENNE :
BUSIC, PETAR MATANIC,
FRANK PESUT, :

Defendants. :

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United States Courthouse
Brooklyn, New York

March 22, 1977
11:00 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
BARRY SCHULMAN, ESQ.
EDWARD KORMAN, ESQ.
Assistant U.S. Attorneys

MICHAEL TIGAR, ESQ.
-and-
PIERCE O'DONNELL, ESQ.
Attorneys for Zvonko Busic

DAVID RUDOLPH, ESQ.
-and-
MICHAEL ASEN, ESQ.
Attorneys for Defendant Julienne Busic

MARTIN ELEFANT, ESQ.
PAUL BERGMAN, ESQ.
Attorneys for Defendant Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Pesut

Also present:

BORIS MARUNA
Official Croatian Interpreter

second.

(Pause.)

MR. SCHLAM: My understanding, your Honor, is that the defendants were allowed to go to the FBI building with their attorneys and take whatever items of personal use they wished from the suitcases.

THE COURT: Had you searched the other suitcases?

MR. SCHLAM: The other suitcases, to my knowledge, have not been searched.

THE COURT: I wouldn't --

MR. SCHLAM: I'm not sure, your Honor. I just don't know that.

THE COURT: I wouldn't be too sure.

CROSS-EXAMINATION (Continued)

BY MR. RUDOLPH:

Q Did you search this luggage?

A No, I did not.

MR. RUDOLPH: Nothing further, your Honor.

THE COURT: Any further questions?

MR. SCHLAM: We have nothing further, your Honor.

THE COURT: All right, gentlemen.

I think there is probable cause to arrest and search without a warrant and I will hold that you might search that luggage without consent.

MR. RUDOLPH: I would like an opportunity -- since this came up quite out of the blue -- I'd like an opportunity to read the cases which the Court has cited and to perhaps write a letter to the Court giving my view of the facts with respect to the validity of a warrantless search.

I'd like to have at least an opportunity to look at those cases and see --

THE COURT: You may do that. I see no objection to that.

MR. KORMAN: This case is stronger than I though when I made the motion for rehearing.

I thought it was suitcases rather than handbags. Even the First Circuit which ruled against searching suitcases said you can search a handbag.

THE COURT: This isn't that type of case. That's where she had control of the handbag. In this particular case the handbag wasn't under her control but under the control of the French who seized it in connection with a reasonable belief that she had committed a crime and from then on it was given to the FBI who also made an arrest of this person because they had probable cause to believe she had committed a crime.

MR. RUDOLPH: The arrest was made pursuant to an order by Judge Bramwell. There was no search warrant --

THE COURT: I doubt that a warrant was necessary to make the arrest under the circumstances.

What I am saying is they must try to get a warrant if they had the time --

MR. RUDOLPH: That was my point.

THE COURT: But if they didn't have time then they couldn't have.

In this case, on the basis of probable cause and in that connection, naturally they can search anything within the immediate vicinity of the defendant -- that's Schimmel -- but that's not the basis under which this search was made.

I think they can make a search but they made a warrant arrest here and I think in view of the whole alleged circumstances of this case they had probable cause to believe that in the inventory of the handbags some dangerous explosives might be found. They had probable cause to believe that under the circumstances. That would justify, it seems to me, a search.

You may write your letter.

Anything else?

I will see you tomorrow, gentlemen.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----------------------------------x

UNITED STATES OF AMERICA :

-against- :

ZVONKO BUSIC, JULIENNE BUSIC, : 76-CR-602
PETAR MATANIC, FRANE PESUT
and MARK VLASIC, :

Defendants. :

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BARTELS, District Judge

MEMORANDUM-DECISION and ORDER

Defendants are charged under 49 U.S.C. §1472(i) and 18 U.S.C. §2 with one count of air piracy from which death resulted, one count of air piracy, and one count of conspiracy to commit air piracy under 18 U.S.C. §371. Section 1472(i) reads in pertinent part as follows:

> (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—
>
> > (A) by imprisonment for not less than 20 years; or
> >
> > (B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.
>
> (2) As used in this subsection, the term "aircraft piracy" means any seizure or

> exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

Section 1301(34) of Title 49 of the United States Code defines the special aircraft jurisdiction to exist

> while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard.

Defendants move to dismiss Count I, which charges a resulting death, on the grounds that (i) the alleged death occurred outside of the special aircraft jurisdiction of the United States and thus that the indictment fails to charge a violation of §1472(i)(1)(B) and (ii) the phrase "if the death of another person results from the commission ... of the offense" in §1472(i)(1)(B) is void for vagueness.

For the purposes of these motions the following facts must be assumed. On Friday, September 10, 1976, a plane bound from New York to Chicago was hijacked at a point near Buffalo and redirected to Canada, Iceland and finally to Paris, France, where the hijackers surrendered to French authorities on Sunday, September 12. Sometime prior to embarking on the plane, a bomb was placed in a Grand Central Station locker by one or more of the defendants along with certain demands and instructions from the hijackers. The existence of the contents of the locker was first made known when a note was passed to airline personnel near Buffalo and relayed to the authorities as part of the initial seizure of the aircraft. The note stated in part:

> 1. This airplane is hijacked.
>
> 2. We are in possession of five gelginite bombs ....
>
> 3. In addition, we have left the same kind of bomb in a locker across from the Commodore Hotel on 42nd Street. ...
>
> 4. Further instructions are contained in a letter inside this locker ....
>
> 5. The appropriate authorities should be notified from the plane immediately.
>
> ....

Officers of the New York City Police Bomb Squad immediately went to the locker and removed its contents, taking the bomb to a Bronx deactivation site where it exploded, killing one officer and injuring three other officers. The pilot of the aircraft was informed of this event while the plane was in Paris but before the hijackers had surrendered control of the aircraft. The defendants are being charged in Count I with this resulting death.

Jurisdiction and Sufficiency of Count I

Defendants assert that they cannot be prosecuted for a death resulting from the commission of air piracy unless the death occurs on the hijacked aircraft while it is "in flight," as that term is defined by 49 U.S.C.A. §1301(34), and that therefore Count I of the indictment must be dismissed since the death therein alleged occurred on the ground. We disagree. There is no dispute that the death took place at a point in time when the hijacked plane was still "in flight," and we hold that this court is not deprived of jurisdiction merely because at that time the death occurred on the ground and not on the aircraft.

From the statute it is clear that the air piracy must take place on an aircraft within the special aircraft jurisdiction of the United States, but there is no indication that a death which results from the commission of air piracy must take place inside the aircraft for this court to have jurisdiction over the death resulting from the offense. Section 1472(i) simply creates the underlying federal offense of air piracy and also creates the offense, more severely punished, of air piracy with the aggravating factor of resulting death.[1/] There can be no dispute that Congress has the power under the commerce clause to sanction a death which occurred on the ground which resulted from an air piracy. The only question, in view of the definition of special aircraft jurisdiction, is whether Congress has done so in §1472(i)(1)(B). That the aggravating activity need not have occurred within the special area of federal jurisdiction encompassing the underlying offense is supported by United States v. Pietras, 501 F.2d 182 (8th Cir.), cert. denied, 419 U.S. 1071 (1974), a case under 18 U.S.C. §2113(d), where the aggravating factor of assault took place during the getaway from the underlying offense of robbing a federally insured bank. To the same effect is Clark v. United States, 184 F.2d 952, 954 (10th Cir. 1950), cert. denied, 340 U.S. 955 (1951), where the court stated:

> Murder or kidnapping committed in avoiding or attempting to avoid apprehension for robbing a national bank and escape or attempted escape from arrest or confinement for this offense are all interrelated and may not be simultaneous with the robbery. Time and place of the offense is not the constitutional test, but the relation of the offense to the robbery. ... Nor would the

> fact that the act was also a crime under the state law invalidate the statute. An act may be criminal under the law of both jurisdictions.

See also Note, Piggyback Jurisdiction in the Proposed Federal Criminal Code, 81 Yale L.J. 1209, 1214, 1240 (1972).

Insofar as cases interpreting the scope of the special maritime and territorial jurisdiction of the United States are relevant, our conclusion that a resulting death need not have occurred on board an aircraft within the special aircraft jurisdiction of the United States is supported by United States v. Leonard, 500 F.2d 673 (5th Cir. 1974), where the federal court was found to have jurisdiction over a rape which commenced within the special territorial jurisdiction of the United States when the victim was abducted but was consummated outside such jurisdiction. The statute under which defendant was prosecuted, 18 U.S.C. §2031, could have been read to require that the entire offense of rape be committed within the special territorial jurisdiction of the United States, but the court rejected this narrow interpretation. A fortiori, under 49 U.S.C. §1472(i)(1)(B), where the only element of the offense which clearly must be within the special aircraft jurisdiction of the United States is the air piracy, the death resulting therefrom need not also take place therein. The defendants cite the following cases as suggesting a different result, but they are clearly distinguishable from Clark, supra, and Pietras, supra, and in all events we are not persuaded by their reasoning. See United States v. Davis, F.Cas. No. 14,932 (C.C.D.Mass. 1837) (shot fired from American vessel, death on foreign vessel; held to be outside maritime jurisdiction of United States); United States v. McGill, F.Cas. No. 15,676 (C.C.D.Pa. 1806) (semble); United States v. Morel, F.Cas. No. 15,807 (C.C.D.Pa. 1834) (goods stolen in foreign port and carried onto American vessel outside maritime jurisdiction).

Relying also on the more recent cases of United States v. Bowman, 260 U.S. 94 (1922), and United States v. Bass, 404 U.S. 336 (1971), however, the defendants insist that §1472(i)(1)(B) must be construed to include the requirement that the resulting death take place within the special aircraft jurisdiction of the United States. In Bowman, the issue was whether the particular statute there involved should be construed to cover an offense commited on the high seas where there was no express guidance from

Congress on the point. The Court noted that certain classes of offenses, such as murder and robbery, must generally be committed within the territorial limits of the sovereign to be punishable, and that "[i]f punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." Id. at 98. But, the Court continued,

> the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.

So in this case "the same rule of interpretation should not be applied." Id. To give §1472(i)(1)(B) the crabbed construction urged by defendants would mean that a hijacker who, while the aircraft was in flight, wounded a passenger who died from such wound on the ground after the hijack ended could not be prosecuted for a resulting death. This would seriously undercut the "scope and usefulness of the statute," id., especially in cases of international hijackings where the death might occur in a foreign country outside the jurisdiction of any state. The rationale of Bowman thus reinforces our conclusion that the locus of deaths resulting from the commission of air piracy should not be limited to the aircraft while it is "in flight."

United States v. Bass, supra, is also inapposite. In that case the defendant was prosecuted for simple possession of a firearm under 18 U.S.C. §1202(a)(5). The Court was faced with the question of whether it was necessary to prove that he possessed the weapon in commerce where the statute prohibited certain persons from receiving, possessing or transporting in commerce a firearm. The Court, noting the ambiguity of the statute, decided on a construction requiring the commerce nexus for two reasons: (i) given ambiguity in a criminal statute, the narrower construction should prevail, and (ii) unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance by federalizing a traditionally local offense without requiring an interstate commerce nexus. Similarly, defendants argue here, Congress did not intend to change the federal-state balance by bringing within the scope of §1472(i)(1)(B) a death occurring outside an aircraft. In Bass there was no clear nexus between the defendant's possession of the firearm and interstate commerce.

However, where a death results from air piracy there is such a nexus regardless of where the death occurred. Consequently there is no question of any significant change in the balance of federal-state relations. The defendants vigorously argue that §1472(i) was intended solely to cover offenses committed while the aircraft was in flight. See S.Rep. No. 694, 87th Cong., 1st Sess. 3-4 (1961); H.R.Rep. No. 958, 87th Cong., 1st Sess. (1961). But our analysis indicates that the offense Congress was speaking of in the committee reports was the underlying federal offense of air piracy,[2/] and not the aggravating factor of resulting death. See Clark v. United States, supra. While Congress, in passing the air crimes legislation containing the predecessor of §1472(i), Act of Sept. 5, 1961, Pub.L. No. 87-197, 75 Stat. 466, indicated that it did not wish to preempt state jurisdiction, see, e.g., H.R.Rep. No. 958, 87th Cong., 1st Sess., 1961 U.S. Code Cong. & Ad. News 2563, subsequent antihijacking legislation did emphasize the overwhelming federal interest in air piracy and all of its consequences, even though it did not preempt state jurisdiction. See Act of Oct. 14, 1970, Pub.L. No. 91-449, 84 Stat. 921 (creating "special aircraft jurisdiction of the United States"); Antihijacking Act of 1974, Pub.L. No. 93-366, 88 Stat. 409 (amending §1472(i); and asserting federal jurisdiction over unsuccessful attempts at air piracy which take place entirely on the ground).

We conclude that the resulting death need not take place within the special aircraft jurisdiction of the United States and the motion to dismiss Count I for lack of jurisdiction is accordingly denied.

Section 1472(i)(1)(B) not void for vagueness

Defendants contend that Count I should be dismissed because the phrase "if death results" is unconstitutionally vague. It has been firmly established "[t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties ...." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). At the same time the Connally Court continued, "a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ" would suffice to save a statute from unconstitutional vagueness. Id. See also Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952). Indeed the very phrase "if death results" was construed by the Second Circuit in United States v. Guillette, 547 F.2d 743, 749 (2d Cir. 1976), where the court recognized that "[t]he accepted practice among federal courts in construing a federal criminal statute which uses a common law term without defining it is to give the term its common law meaning." The court concluded that the common law principles of legal causation and proximate cause were embodied in the phrase "if death results," and that "[t]o confine the meaning of 'result' to direct causation not only would be at odds with common law principles of legal causation but also would seriously impair the effectiveness of § 241." Id. The phrase "if death results" coupling a higher penalty, usually death or life imprisonment, to the commission of the underlying offense, is found in many statutes.[3] In the absence of any indication to the contrary, we must assume that Congress intended that the word "results" be given its common law meaning, C. Sands, Sutherland Statutory Construction §50.03 (4th ed. 1973), and we so find as regards §1472(i)(1)(B).

Accordingly, the motion to dismiss Count I on the ground that §1472(i)(1)(B) is unconstitutionally vague is denied.

SO ORDERED.

Dated: Brooklyn, N.Y.,
March 22, 1977.

John R. Bartels
United States District Judge

FOOTNOTES

1/ The distinction between aggravating factors which are written into the offense and aggravating factors which are to be considered only at a post-verdict sentencing hearing is clear. Though the clause "if the death of another person resulted from the commission of the offense" appears in the penalty provision of §1473(c), it first appears in the offense provision of §1472(i) and thus must be considered an element of the offense. To read the requirement of resulting death as merely part of the penalty provisions under §1473(c) would be to presume that Congress intended that the death penalty be imposed for a resulting death when such resulting death was found only by a preponderance of the evidence as set forth in §1473(c). Such a reading would be severely prejudicial to defendants, contrary to common sense and unconstitutional as violative of the basic requirements of due process. Cf. In re Winship, 397 U.S. 358 (1970) (imprisonment on strength of same evidence which would suffice in a civil case amounts to lack of fundamental fairness). See cases cited in note 3, infra, where resulting death is assumed to be an element of the offense.

2/ Although we refer solely to the offense of air piracy, the 1961 air crimes legislation also created the offenses of interfering with the flight crew, carrying weapons aboard aircraft, assault, maiming, larceny, receiving stolen property, murder, manslaughter, attempted murder or manslaughter, rape, statutory rape and robbery committed on board an aircraft in flight, as well as the offense of giving false information with respect to such offenses. Act of Sept. 5, 1961, Pub.L. No. 87-197, 75 Stat. 466. The necessity of stressing that these offenses take place on board an aircraft in flight is understandable, since most of these offenses are otherwise of strictly local concern. See United States v. Bass, 404 U.S. 336 (1971).

FOOTNOTES - page 2

3/ See 18 U.S.C. §§ 34, 241, 242, 245(b), 351(b), 351(d), 832(a), 832(b), 833, 834(f), 844(d), 844(f), 844(i), 1716, 1751(b), 1751(d), 1992; 42 U.S.C. §3631; 46 U.S.C. § 170(15); 49 U.S.C. §§ 1472(i), 1472(n). While reported prosecutions of resulting death cases under the above statutes are rare, the phrase is by no means a dead letter. See United States v. Guillette, 547 F.2d 743 (2d Cir. 1976) (18 U.S.C. §241); United States v. Pacelli, 521 F.2d 135 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976) (semble); United States v. Pacelli, 491 F.2d 1108 (2d Cir.), cert. denied, 419 U.S. 826 (1974) (semble); United States v. Robinson, 503 F.2d 208 (7th Cir. 1974), cert. denied, 420 U.S. 949 (1975) (semble); United States v. Stifel, 433 F.2d 431 (6th Cir. 1970), cert. denied, 401 U.S. 994 (1971) (18 U.S.C. §1716).

March 24, 1977

Hon. John R. Bartels
United States District Judge
Eastern District of New York
225 Cadman Plaza, East
Brooklyn, New York

Re: United States v. Busic, 76 CR 502

Dear Judge Bartels:

In a letter dated March 23, 1977, Mr. Korman urges the Court to deny Mrs. Busic's motion to suppress and advances two basic arguments in support of his position. This letter is submitted, as a brief and hopefully final response to the government's strained attempts to justify a search of Mrs. Busic's baggage.

The first argument advanced by Mr. Korman is that, assuming that the initial seizure of Mrs. Busic's baggage was lawful, the delay in conducting the search would be immaterial. Unfortunately, the government offered absolutely no testimony regarding how the baggage came to be in French custody. Since the facts make it clear that Mrs. Busic was in the control tower at the time the other defendants surrendered and left the aircraft, Mr. Korman's statement on page 2 that her personal effects were removed "from her immediate possession" is simply inaccurate. Neither can it be argued that the F.B.I. seized it incident to Mrs. Busic's arrest, since she did not have the baggage in her possession at that time.

Be that as it may, Mr. Korman's argument simply glosses over the fact that the delay in conducting the search here lasted at least five full days. In United States v. Edwards, 415 U.S. 800 (1974), the search occurred only ten hours after the arrest, the items searched (clothing) were in the immediate possession of the arrestee at the time of his arrest, and the purpose was to preserve evidence which might otherwise be lost. Under these limited circumstances, a sharply divided Court held that "this was no more than taking from respondent the effects in his immediate possession . . . and reasonable delay in effectuating [the search] does not" invalidate it. 415 U.S. at 805 (emphasis supplied). It is simply stretching *Edwards* past the breaking point to suggest that it applies where the search is conducted days after the arrest on items which were not in the defendant's control at the time of the arrest. Even Agent Hittmeier recognized this fact when he cautioned his fellow agents not to search the baggage until a warrant had been obtained. It is instructive to note that in the other cases relied upon by Mr. Korman in support of his argument, *White*, *Lam*, *Mak Chiv*, and *Muhammed*, the items were seized from the defendants immediate possession at the time of the arrest and were searched within a matter of hours.

Mr. Korman's second argument is that this Court should endorse the principle that a "baggage" exception to the warrant requirement exists. He cites no case which directly supports this contention, and spends most of his argument speculating that the Supreme Court may reverse *United States v. Chadwick*, 532 F.2d 773 (1st Cir. 1976), which directly refutes his position. He forgets Justice Powell's admonition in *United States v. Watson*, 423 U.S. 411, 427 (1976), that exceptions to the warrant requirement of the Fourth Amendment are limited to a few "jealously and carefully drawn" circumstances. The burden of justifying a new category of warrantless search is, moreover, on the government, *United States v. Chadwick*, *supra*, 532 F.2d at 778, and Mr. Korman has failed to carry this burden.

Respectfully submitted,

David Rudolf

Michael Era Asen

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

DGT:ERK:rb
F. #763251

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

March 24, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic
76 CR 602

Dear Judge Bartels:

The letter submitted by the defendant Julienne Busic contains some misleading statements of law and fact.

First, the search of the handbag by the F.B.I. took place some time within twenty-four hours, not five days, after her arrest at John F. Kennedy International Airport and within forty-eight hours of her arrest in France.

Second, the defendant totally ignores the following critical language from the opinion of Justice White in United States v. Edwards, 415 U.S. 800 (1974):

> *** Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.
>
> In Cooper v. California, 386 U.S. 58 (1967), an accused had been arrested for a narcotics offense and his automobile impounded preparatory to institution of forfeiture proceedings. The car was searched a week later without a warrant and evidence seized that was later introduced at the defendant's criminal trial. The warrantless

> search and seizure were sustained because they were "closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained .... It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." Id., at 61-62. It was no answer to say that the police could have obtained a search warrant, for the Court held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable, which it was.

The reasoning, particularly the discussion of Cooper v. California, is plainly applicable here.

Third, we do not believe it is material to our argument whether the French law enforcement authorities removed the bag from her person or seized it on the plane. In either event, an immediate search was possible. Surely law enforcement authorities who regain control of a plane which hijackers have in their control, may search and seize items on board the plane in the same manner that they could search and seize items which they find inside a stolen automobile, after the persons inside have been apprehended. See, e.g., Chambers v. Maroney, 399 U.S. 42 (1970); White v. Texas, 423 U.S. 67 (1976); see, also, United States v. Soriano, 497 F.2d 147 (C.A. 5, en banc, 1974).

If it could have been searched then, it could surely have been searched afterward as Chambers, Edwards, White and Cooper make clear.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

Edward R Korman

By: EDWARD R. KORMAN
Chief Assistant
United States Attorney

cc: David Rudolph, Esq.
Michael Ira Asen, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----------------------------x

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,

Defendants.

-----------------------------x

76 Cr. 602 (JRB)

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of DAVID S. RUDOLF, and upon all the papers and proceedings heretofore had herein, the undersigned, on behalf of the defendant JULIENNE BUSIC, hereby moves this Court, before the Honorable John R. BARTELS, in the United States District Court for the Eastern District of NEW YORK, for an order precluding the government from using as evidence (1) the two-page xerox document concerning Boeing 727 aircraft which was taken from Mrs. Busic's bags; (2) the fingerprint testimony concerning that document; (3) Jane's All the World's Aircraft; and (4) the fingerprint testimony concerning that book; and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
March 28, 1977

Respectfully submitted,

David S. Rudolf

DAVID S. RUDOLF
200 West 79th Street
New York, New York 10024
(212) 873-3409

MICHAEL IRA ASEN
217 Broadway, Room 404
New York, New York 10007
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TO:

DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District of New York

CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-------------------------------x

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANJO PESUT,
and MARC VLASIC,

Defendants.

-------------------------------x

76 Cr. 602 (JRB)

AFFIDAVIT IN SUPPORT
OF MOTION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID S. RUDOLF, being duly sworn, deposes and says:

1. I am an attorney for Julienne Busic, a defendant in this case.

2. On March 21, 1977, this Court held that Mrs. Busic's identification of luggage and consent to search of September 12, 1976, were both involuntary and ordered that the results thereof be suppressed.

3. On March 22, 1977, Chief Assistant United States Attorney Edward Korman, while declining to challenge the Court's ruling with regard to the validity of the identification and the consent, requested that the government be allowed to call additional witnesses to establish that the search itself was lawful despite the involuntary consent (Transcript, pg. 732). The Court granted this request and on March 24, 1977, heard the testimony of Special Agent Kenneth Hittmeier. At the conclusion of that testimony the Court held that the search conducted on September 13, 1976, was lawful even though the consent was not.

4. Since this ruling obviously did not affect the Court's previous determination that the identification and consent were involuntary, the critical question is sharply drawn. Assuming that the search of September 13 was itself constitutional, was it nevertheless the product of the involuntary acts of the preceding day? If it was, then the results must be suppressed in accordance with the Court's written order of March 21.

5. This factual question is easily determined from the record. Special Agent Hittmeier testified that the only baggage which he searched on September 13 was Mrs. Busic's (Transcript, pg. 1334). The reason he did not search the other baggage was because he did not have any consent forms for them (Transcript, pg. 1334). The only reason he searched the two bags belonging to Mrs. Busic was because she had signed such a form the previous day (Transcript, pg. 1335). Indeed, the only reason he even knew that those two particular bags belonged to Mrs. Busic was that she had identified them the preceding day (Transcript, pg. 1333). Hittmeier's testimony therefore makes it clear that the search conducted on September 13, however constitutional it might have been, was the direct product of the involuntary identification and consent of the day before. Absent those two events, Agent Hittmeier would have vouchered without a search Mrs. Busic's bags the same way he vouchered without a search the other three bags and a box which allegedly belonged to the hijackers (see Exhibit 18, 302 Report of Agent Jennings). Put another way, if not for the invalid identification and consent, the search of September 13 would not have taken place.

6. The fruits of this search were succinctly set forth for the Court by Mr. Schlam as follows:

> " . . . from a book called Jane's All the World Airplanes, which is a standard reference book of all commercial aircraft and military aircraft, there was a 2-page xeroxing of a Boeing 727, which was the hijacked plane. That 2-page Xerox document was found in one of these two bags. Now, based upon that, we were able -- that Xeroxing contained the fingerprints of Mrs. Busic, and her husband, Mr. Busic. We then were able to trace where that came from, and, in fact, it came from a book of Jane's All the World's Aircraft, '74 - '75 edition, from the Mid-Manhattan Branch of the New York Public Library, and that particular book contains Mrs. Busic's fingerprints. That is the train of evidence that we are concerned with here." (Transcript, pgs. 1319-1320)

7. Since the search of September 13th, while itself lawful, was nevertheless the product of the prior illegalities, we respectfully ask that the Court preclude the government from using as evidence the above items, in accordance with the order of March 21, 1977.

WHEREFORE, it is respectfully requested that an order be entered precluding the government from using as evidence (1) the two-page xerox document concerning Boeing 727 aircraft which was taken from Mrs. Busic's bags; (2) the fingerprint testimony concerning that document; (3) Jane's All the World's Aircraft; and (4) the fingerprint testimony concerning that book.

David Rudolf
DAVID S. RUDOLF

Sworn to before me this
28th day of March, 1977.

Ethel Fialkin
Notary Public

ETHEL FIALKIN
NOTARY PUBLIC, State of New York
No. 03-1205700
Qualified in Bronx County
Commission Expires [illegible] 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, and MARC VLASIC, Defendants.	76 Cr. 602 (JRB) MEMORANDUM IN SUPPORT OF ZVONKO BUSIC'S DEFENSE OF MENTAL CONDITION INCONSISTENT WITH THE MENTAL ELEMENT FOR THE OFFENSES CHARGED IN THE INDICTMENT

INTRODUCTION

Prior to trial, defendant Zvonko Busic filed, pursuant to Rule 12.2(b), a timely notice of an intention to rely upon a defense based upon a mental condition bearing upon the issue of whether he had the mental state required for the offenses charged in the indictment. The defendant further put the government on notice that he intends to introduce evidence relating to a mental condition. On March 21, 1977, counsel for the defendant voluntarily furnished the government with a copy of a detailed, four-page summary of the tentative evaluation of Dr. Bernard Diamond, the defense psychiatrist. A copy of this report is attached to this memorandum.

This memorandum is submitted in support of the admissibility of the findings, conclusions, and supporting data resulting from Dr. Bernard Diamond's examinations of the accused and related investigations. The evidence is plainly admissible in support of numerous issues open to the defense and in derogation of the government's burden of proof. Specifically, the testimony is admissible (1) as tending to negate the existence of criminal intent; (2) as tending to establish that the accused was not

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criminally responsible for his conduct under the tests of criminal responsibility adopted in United States v. Freeman, 357 F.2d 602 (2d Cir. 1966); (3) as inconsistent with a "voluntary act", an essential ingredient of all criminal offenses.

I.

DR. DIAMOND'S TESTIMONY IS ADMISSIBLE ON ALL ISSUES AS TO WHICH IT IS RELEVANT.

Rule 702 of the Federal Rules of Evidence provides that scientific, technical, or other specialized knowledge is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue."

Manifestly, the mental processes and state of mind of an alleged aircraft hijacker are beyond the boundaries of everyday experience. There is far more here that "the host of attitudes and syndromes that are a part of daily living", United States v. Bright, 517 F.2d 584, 586 (2d Cir. 1975), and any intelligent assessment requires expert assistance.

Psychiatric evidence is regularly admitted in the trial of offenses where the motivations are much more accessible and closer to the experience of the jury, e.g. income tax evasion, United States v. Levy, 326 F. Supp. 1285 (D. Conn. 1971); United States v. Sheller, 369 F.2d 293 (2d Cir. 1966); failure to file a tax return, United States v. Baird, 414 F.2d 700 (2d Cir. 1969), and failure to report for the draft, United States v. Strutton, 494 F.2d 686 (2d Cir. 1974). Indeed, psychiatric evidence is customarily offered and received in aircraft piracy cases. See, e.g., United States v. Coleman, 501 F.2d 342 (10th Cir. 1974); United States v. Greene, 497 F.2d 1068 (7th Cir. 1974); United States v. Bohle, 475 F.2d 872 (2d Cir. 1973).

Where, as here, the defendant's hope for acquittal rests in large part on his asserted lack of responsibility, the expert testimony is "relevant" and "critical", *United States* v. *Dwyer*, 539 F.2d 924, 927 (2d Cir. 1976). Its exclusion would not only be reversible error, *id*., but it would also be a deprivation of due process and the right to compulsory process. *Cf*. *Washington* v. *Texas*, 388 U.S. 14, 19 (1967); *Chambers* v *Mississippi*, 410 U.S. 284 (1973).

II.

THE EVIDENCE IS ADMISSIBLE ON THE ISSUE OF CRIMINAL INTENT.

Psychiatric evidence of mental abnormality is admissible, notwithstanding the absence of any claim of "insanity", wherever and whenever it has a bearing upon the accused's state of mind at the time the offense was allegedly committed. Model Penal Code § 4.02(1) (Official Draft 1962); Rule 12.2(b) of the Federal Rules of Criminal Procedure. In reversing a conviction for failure to admit psychiatric evidence tending to show that the accused killed in the "heat of passion", the Pennsylvania Supreme Court noted that even though it still employed the *M'Naghten* test of insanity, the defendant was entitled to support his claim of mitigation to manslaughter by psychiatric evidence that he killed in the heat of passion. "[A]ny evidence -- lay or psychiatric -- pertinent to that defense should be admissible." *Commonwealth* v. *McCusker*, 448 Pa. 382, 292 A.2d 268 (1972). Similarly, it is held that such evidence can be admitted to negate premeditation and deliberation, *People* v. *Wolff*, 61 Cal. 2d 795, 394 P.2d 959 (1964); malice, *People* v. *Conley*, 64 Cal. 2d 310, 411 P.2d 911 (1966); intent to burglarize, *People* v. *Taylor*, 220 Cal. App. 2d 212, 33 Cal. Rptr. 654 (1963); intent to escape from prison, *Schwickwrath* v. *People*, 159 Colo. 390, 411 P.2d 961 (1966); intent to steal, *People* v. *Colavecchio*, 11 App. Div. 2d 161, 202 N.Y.S. 2d 119 (1960); and intent to evade taxes, *Rhodes* v. *United States*, 282

F.2d 59 (4th Cir. 1960), United States v. Levy, supra, 326 F. Supp. 1285 (D. Conn. 1971). As noted by LaFave and Scott,

> "The reception of evidence of the defendant's abnormal mental condition, totally apart from the defense of insanity, is certainly appropriate whenever that evidence is relevant to the issue of whether he had the mental state which is a necessary element of the crime charged. Were it otherwise, major crimes specifically requiring a certain bad state of mind would, in effect, be strict liability offenses as applied to abnormal defendants." Criminal Law 33 (1972).

Accord, United States v. Brawner, 471 F.2d 969, 998-1002 (D.C. Cir. 1972).

A. The Testimony Tends to Disprove "Wrongful Intent"

One is guilty of aircraft piracy under 49 U.S.C. 1472(i) only if he seizes control of an aircraft "with wrongful intent." There are at least four meanings of "wrongful intent", any one of which compels the admissibility of Dr. Diamond's testimony.

1. Animus Furandi

Despite clear evidence that piracy on the high seas required animus furandi (intent permanently to deprive the owner of the ship), see "Piracy" in Black's Law Dictionary, the Seventh Circuit rejected the argument that aircraft piracy requires animus furandi in United States v. Bohle, 445 F.2d 54, 60 (7th Cir. 1971). The Court in Bohle, which dealt only in passing and in a single paragraph with the meaning of "wrongful intent", appears not to have been presented with the legislative history of the Act or the historical meaning of "wrongful intent."

The Committee Reports on this statute indicate that Congress very carefully and meticulously drafted this section, after studying the historical definition of sea piracy. See H.R. 958, 1961 U.S. Code Cong. and Adm. News, pp. 2567-69; 107 Cong. Rec., Pt. 12, 87th Cong., 1st Sess., Aug. 21, 1961, p. 16545. And while it is clear that the act of aircraft piracy was not intended necessarily to be identical to that of sea piracy, the requisite mental element is the same.

The phrase "wrongful intent" has a long and prominent history in the law of piracy and virtually nowhere else in the criminal law. In 1812, Mr. Justice Story, sitting as Circuit Justice, declared that piracy was "running away with the ship, with the wrongful and fraudulent intent thereby to convert the same to the taker's own use, and to make the same his own property against the will of the owner. The intent must be . . . wicked and depraved . . . animus furandi." United States v. Tully, Fed. Cases No. 15, 545, 1 Gall. 247 (D. Mass. 1812).

Again in The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885), the court equated piracy with robbery, and suggested that persons who took control of another's ship could assert either that they had no intent to steal or that they believed they were lawfully in possession. Such a belief could arise, for example, if the crewmembers thought they were acting on behalf of their sovereign in an act of war, or were mistaken as to the ownership of the vessel.

The court in Ambrose Light also quoted approvingly the jury instruction in United States v. Baker, 5 Blatchford 6, 24 Fed. Cas. 962 (S.D.N.Y. 1861), where the court defined piracy as "Spoliation with wrongful intent." In Baker, the court elaborated that the requisite mens rea was the same as for robbery.

It thus appears clear that in appropriating "wrongful intent" from sea piracy, the Congress knew what it was doing, and meant to require the same mens rea as for sea piracy -- a wicked intent permanently to deprive the owner of the aircraft.

2. A Specific Evil, Wicked Purpose

Even if animus furandi is not required, Congress' inclusion of "wrongful intent" as an element of the offense onclusively establishes that the phrase at least connotes a "wicked and depraved" purpose, United States v. Tully, supra, including knowledge that one's conduct is without justification or excuse.[1] This much is ordinarily read into serious crimes, in the absence of statutory language concerning intent. Morisette v. United States, 342 U.S. 246 (1952).

As then Circuit Judge Blackmun said in Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960), a specific intent is required in a criminal statute unless the statute does not mention any intent, "the penalty is relatively small, . . . conviction does not gravely besmirch, . . . the statutory crime is not taken over from the common law, and . . . congressional purpose is supporting." Such is manifestly not this case.

If a specific, wicked purpose were not required under this statute, it would be the only capital offense known to the law where no such intent is required, and the only criminal offense which expressly specifies an intent without meaning it. To read "wrongful intent" out of the statute would not only violate all canons of construction, it would offend Due Process, cf. Bouie v. Columbia, 378 U.S. 347 (1964), and would give rise to a claim of disproportionality under the Eighth Amendment.

3. Conscious Awareness

Even if no animus furandi and no evil, wicked purpose were required, criminal intent in aircraft piracy -- as in all other crimes -- requires a modicum of conscious awareness of the nature and quality of the act, its surrounding circumstances, and probable consequences. Without such awareness, it makes no sense to speak of an act as "intentional." See LaFave and Scott, Criminal Law 195-96 (1972); Model Penal Code § 2.02, Comment (Tent. Dr. No. 4, 1955), 123-29.

---

[1] The only reference to "wrongful intent" in Words and Phrases is a citation to State v. Viscarra, 84 N.M. 217, 501 P.2d 261, 262 (1972), where it is defined as "wicked or felonious intent." Viscarra cites Brown v. Village of Demming, 56 N.M. 609, 243 P.2d 609 (1952), where "felonious" is defined as "malicious, villainous, wicked, traitorous, perfidious . . . wrongfully and wickedly."

4. A Mind Free to Act

Finally, all criminal intent, whether general or specific, includes

> " . . . a state of mind which willingly consents to the act that is done, or free will choice, or volition in the doing of the act; it ["intent"] means that the act is voluntary, and that it proceeds from a mind free to act." 22 C.J.S. (Criminal Law) § 1(e).

On any one of the foregoing issues, Dr. Diamond's testimony is highly relevant and critical to the defense. Zvonko Busic plainly had no animus furandi; his belief in the "righteousness" of his cause may have precluded recognition of the "wrongfulness" of the venture. His belief that the hijacking could occur with complete safety may manifest a lack of awareness of the risks and the surrounding circumstances of the operation. His belief that the hijacking was a "heroic" act for his countrymen and completely safe certainly bears on the evilness of his acts. Finally, Dr. Diamond's testimony tends to prove that the act was not volitional or voluntary, as criminal intent requires.

B. The Testimony Has Special Relevance to Count I -- Air Piracy Resulting In Death.

Where, as here, no death is directly caused by those charged with air piracy but results instead from a combination of acts involved in hijacking with other events and actors, there is no criminal responsibility for the death if it was not the deliberate, intended, probable or foreseeable result of the acts of the accused hijacker. Cf. United States v. Guillette, 547

F.2d 743, 749 (2d Cir. 1976).[2/] Furthermore, if the accused did not foresee such a result, whether due to his abnormal mental state or otherwise, he is not responsible for the death, even if others would or should have foreseen the death.

As the government has conceded and this Court has acknowledged, aircraft piracy resulting in death (Count I) is a different offense from mere aircraft piracy (Count 2). A fatal consequence is not merely a condition of enhanced punishment, as in a recidivist statute. Rather, it is an element of the aggravated or more serious offense.[3/] The accused must therefore have had some conscious awareness of the risk of death before he can be held responsible for it. Otherwise, strict liability would be imposed for the aggravated offense. Such a result should not be inferred without specific language clearly eliminating the mental element. Morisette v. United States, 342 U.S. 246 (1952).

As provided in the Model Penal Code, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." A.L.I. Model Penal Code § 2.02 (Official Draft 1962). Furthermore, "when the culpability sufficient to establish a material element of the offense is not prescribed by law, such element is established [only] if a person acts purposely, knowingly or recklessly with respect thereto." Model Penal Code, *supra*, § 2.02(3). Thus, even though the requisite mental elements for the basic offense of

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[2/] The Court is also directed to the Memorandum Concerning Defendant Zvonko Busic's Requests to Charge and the accompanying proposed instructions on Count One.

[3/] The term "'element of the offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as (a) is included in the description of the offense, or (b) establishes the required kind of culpability . . ." Model Penal Code § 1.13 (1955) (emphasis supplied).

aircraft piracy are established, *i.e.* usurpation with "wrongful intent", liability for the aggravated crime may not be imposed without proof of recklessness with respect to the death.

There is generally no responsibility for a result unless the accused was actually aware of the risk. LaFave and Scott, *Criminal Law* 215 (1972).[4] And while this may normally be inferred from the circumstances, it is certainly open to the defendant to offer contrary evidence. *Ibid*.

Dr. Diamond's findings are relevant to this issue. Busic's fanatic obsession and fear, as well as other aspects of his mental state, would certainly support his claim that he did not appreciate or believe that his plan involved a significant risk of death. If Dr. Diamond's testimony on this point is believed, therefore, the jury may lawfully find that Busic engaged in a "voluntary act", that he was "criminally responsible", and that he acted with "wrongful intent", yet still find he was not reckless with respect to the death of the police officer and was therefore innocent on Count One.[5]

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[4] One is not reckless unless he "consciously disregards a substantial and unjustifiable risk", Model Penal Code § 2.02(2). Nothing in *United States* v. *Guillette*, 547 F.2d 743 (2d Cir. 1976), casts doubt on this analysis. Indeed, *Guillette* supports the position taken here. That case permitted conviction of the "death results" degree of the § 241 offense if the death was "a foreseeable and natural result" of a conspiracy; if the death was "in furtherance of the purposes of the conspiracy." *Id.* at 748-49. The death in *Guillette* could not have been in furtherance of the purpose of conspiracy unless it was contemplated by the conspirators. Necessarily, the conspiracy must have included as one of its objects conduct known by the conspirators to constitute a serious risk of death; so significant as to make the death a "foreseeable and natural result." In the present case, death was neither desired nor contemplated; nor could it in any sense be said to be "in furtherance of the purpose" of the hijackers.

[5] To the same effect, it should be noted that if defendant was mistaken as to the risk of death, that is if he was unaware of any such risk, his mistake would preclude conviction of the aggravated offense of piracy resulting in death. See LaFave and Scott, *Criminal Law* 356-58 (1972); Model Penal Code § 2.04 (Official Draft, 1962) (ignorance or mistake is a defense if it "negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offence.")

C. The Testimony Has Special Relevance To Count Three -- Conspiracy To Commit Air Piracy.

Regardless of the intent required for the substantive offense of aircraft piracy, the crime of conspiracy requires more than a mere agreement to do the prohibited acts. The crime of conspiracy requires "at least the degree of criminal intent necessary for the substantive offense itself." Developments in the Law -- Criminal Conspiracy, 72 Harv. L. Rev. 920, 939 (1959). In addition, it requires a corrupt or evil motive or a bad purpose. Id. at 936; People v. Powell, 63 N.Y. 88 (1875); Landen v. United States, 299 F. 75 (6th Cir. 1924); Cruz v. United States, 106 F.2d 828 (10th Cir. 1939); People v. Harris, 294 N.Y. 424, 433 (1945). Devitt and Blackmar, Federal Jury Instructions, § 27.05 (1977). Conspiracy is pre-eminently a specific intent offense. Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624, 636 (1941); United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Shliner, 273 F. Supp. 977 (S.D.N.Y. 1967). Thus, even where the substantive offense requires no knowledge of wrongfulness and illegality, a conspiracy to commit that offense requires such knowledge. United States v. Bradley, 455 F.2d 1181, 1188 (1st Cir.), aff'd on other grounds, 410 U.S. 605 (1972).

Dr. Diamond's testimony goes directly to the intent and purpose of Zvonko Busic in entering into the alleged conspiracy. Whether that intent was wrongful, corrupt or evil is a question for the jury -- one on which Dr. Diamond's testimony is manifestly relevant and useful.

III.

THE TESTIMONY IS ADMISSIBLE BECAUSE IT TENDS TO ESTABLISH THAT THE DEFENDANT WAS NOT CRIMINALLY RESPONSIBLE FOR HIS CONDUCT

Regardless of whether Dr. Diamond labels Zvonko Busic's mental condition as a "mental disease or defect", the psychiatrist's testimony is plainly admissible to prove nonresponsibility resulting from "a highly abnormal mental state." Under the law of this Circuit, a person is not criminally responsible for his conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966).

According to Dr. Diamond, Busic believed, and could not help but believe, that his conduct was "heroic" and "righteous." He therefore lacked capacity to appreciate the wrongfulness of his conduct. Even if he believed his acts were unlawful, he did not appreciate their "wrongfulness." Under Freeman, a belief that conduct is "morally justified" is not a belief in "wrongfulness", even if the actor knows the act to be criminal. 357 F.2d at 622, n.52. Accord, United States v. McGraw, 515 F.2d 758 (9th Cir. 1975).

The evidence also suggests that Busic lacked the capacity to conform his conduct to the requirements of law. He acted in a "highly abnormal mental state." His were the acts of "a desperate man" who was "obsessive" and "fanatical" and were compelled by "psychological necessity." Dr. Diamond's failure to label the "highly abnormal mental state" as a "mental disease, illness or defect" does not preclude proof of Busic's incapacity. Busic's condition may not fit a diagnostic label, useful to physicians treating disturbed patients -- perhaps because his abnormality is too unique to have made its way into the diagnostic reference works -- but that is not the meaning of "disease or defect" under Freeman. There is simply nothing talismanic about the terms "mental disease or defect". This Circuit has explicitly repudiated the tyranny of labels. The Court in Freeman adopted the views of the D. C. Circuit in the following language:

> "To correct many of the deficiencies of Durham, the Washington, D.C. Court of Appeals amplified its definition of mental disorder for the purpose of making 'it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect.' To reinforce its decision, the Court redefined mental disease and defect to include 'any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.'" Freeman, 357 F.2d at 622 (n.51).

It is thus patently clear that an expert's labelling of an abnormality as a "disease" or a "defect" is irrelevant to the admissibility of his testimony. In fact, the District of Columbia Circuit disapproved reliance on such labels, pointing out that the terms "disease" and "defect" have "a legal definition independent of their medical meanings", Washington v. United States, 390 F.2d 444, 453 (D.C. Cir. 1967); that the use of such labels tends to substitute "for the facts and analysis which underlie them" and may tend "more to confuse the jury than to guide it." Ibid. Accordingly, the court seriously considered prohibiting the use of such labels by psychiatric witnesses, but ultimately declined to do so because the prohibition would not be a "panacea" and other concepts and labels would be substituted. Id. at 456. Recently, the Second Circuit again expressly approved the approach taken in Washington, agreeing "that the label assigned by psychiatrists to a mental condition does not control the legal standard to be applied." United States v. Kohlman, 469 F.2d 247, 250 (2d Cir. 1972). See also, United States v. Driscoll, 399 F.2d 135, 136 (2d Cir. 1968) (no reference to mental "disease" or "defect").

The District of Columbia Circuit, in its en banc decision overruling Durham v. United States, 214 F.2d 862 (1954), and bringing itself completely into line with Freeman, further explicated the irrelevance of the expert's labels. "Mental disease means one thing to a physician bent on treatment but something different, if somewhat overlapping, to a court of law." United States v. Brawner, 471 F.2d 969, 978 (D.C. Cir. 1972). Reaffirming its McDonald definition of "mental disease or defect" as "any abnormal mental condition" which substantially impairs behavorial controls or mental processes, the court said that the purpose of this definition is to make "plain that clinical and legal definitions [are] distinct." Ibid.

The ultimate purpose of the test of criminal responsibility, the Court said in Brawner, was to exculpate those "who lack the essential, threshold free will possessed by those in the normal range." Id. at 995.

It is thus clear that the federal courts place no importance upon the willingness of the psychiatrist to impose a diagnostic label. See also, United States v. Munz, 504 F.2d 1203 (10th Cir. 1974). Moreover, the evidence often admitted in this Circuit, in efforts to avoid criminal responsibility, is far thinner and less substantial than that offered here. See, e.g. United States v. Henry, 417 F.2d 267 (2d Cir. 1969) (withdrawal from drugs held to raise jury issue as to incapacity to form criminal intent or to have criminal responsibility for sale of drugs); United States v. Kohlman, 469 F.2d 247 (2d Cir. 1972) (alcoholism as defense to bank robbery); United States v. Levy, 326 F. Supp. 1285 (D. Conn. 1971) (defendant's abnormal drive to amass money considered evidence of nonresponsibility for filing false tax returns); United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968) (fear of failure, procrastination).

Dr. Diamond's description of Busic's "highly abnormal mental state" -- as one of obsessiveness, compulsiveness, desperateness, and lacking in capacity for choice -- fits Freeman's definition of nonresponsibility like a tailor-made tank suit.[6]

It is equally plain that the term "insanity" has no place in the trial. There should be no reference to it -- in the charge or elsewhere. Labelling something as an "insanity defense" can serve only to confuse the jury. Neither the ALI nor the Freeman definitions make any reference to "insanity." Rather, they speak of "Mental Disease or Defect Excluding Responsibility" (the title of MPC § 401) and "A person is not responsible for criminal conduct if . . . ." (the body of the test). As has often been noted, a person who is not responsible for his conduct because of mental abnormality is simply not guilty of the offense. See United States v. Levy, 326 F. Supp. 1285, 1288 (D. Conn. 1971). It burdens and confuses the process to treat such an issue -- at least for the jury -- as a separate species of defense involving something called "insanity." See Goldstein and Katz, Abolish the Insanity Defense -- Why Not?, 72 Yale L.J. 853 (1963). Under the ancient "mad dog" test of criminal responsibility, or perhaps even under a rigid and narrow version of M'Naghten, cluttering the trial with references to "insanity" may not have been seriously diverting or confusing. Under Freeman's formulation, however, the defense is not "insanity" but "lack of responsibility", 357 F.2d 606, 609 (2d Cir. 1966), and it would be nothing short of a deception of the jury to tell it otherwise. Cf. United States v. Munz, 504 F.2d 1203 (10th Cir. 1974).

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[6] Freeman speaks of an abnormal mental condition, whereas Dr. Diamond refers to such a state. The tyranny of labelling, so often disavowed in this area, would be revived in full force were that to make a difference. The two words are synonymous. Dr. Diamond will so testify.

IV.

THE EVIDENCE IS ADMISSIBLE AS TENDING TO PROVE THAT, BECAUSE THE DEFENDANT'S CONDUCT WAS "INVOLUNTARY", THERE WAS NO CRIMINAL "ACT"

Nothing is more basic in the criminal law than the concept that criminality requires an act which is "willed" by the accused. Holmes, The Common Law 54 (1881). There is no "act" cognizable by the criminal law unless the bodily movement or movements constitute "a product of the effort or determination of the actor." LaFave and Scott, Criminal Law 180 (1972). Accordingly, apart from questions of mens rea or criminal responsibility under the Freeman test, it is open to the accused to show that what appeared to be voluntary conduct was not such. Thus, a killing occurring during the clouded state between sleeping and waking is not murder because there is no act. Fain v. Commonwealth, 78 Ky. 183, 39 Am. Rep. 213 (1879). Similarly, there is no act in bodily movements during an epileptic episode, People v. Freeman, 142 P.2d 435 (Cal. Dist. Ct. App. 1943), or even during hypnosis, People v. Marsh, 170 Cal. App. 2d 284, 338 P.2d 495 (1959). See generally, Williams, Criminal Law: The General Part § 11 (2d ed. 1961); Silving, Constituent Elements of Crime 83 (1967); Model Penal Code § 2.01, Comment (Tent. Dr. No. 4, 1955).

Despite the fact that most of the conditions which have previously supported a defense of "involuntary act" would also support the defense of nonresponsibility for the moment, the two bodies of doctrine exist alongside one another, offering the defendant the opportunity to prove one or the other, or both. Goldstein, The Insanity Defense 204 (1967). The result, in practical terms, is that the defendant has at least two ways of placing his mental condition before the jury. Id.

The policy behind the requirement of a voluntary act is that "the law cannot hope to deter involuntary movement", Model Penal Code, Comment, supra.

Where the accused insists that his conduct was involuntary, he may of course offer relevant expert evidence, People v. Marsh, supra, and he need not plead or prove a mental disease, defect or other condition as a predicate for that defense. If he succeeds in his claim, he should be acquitted. People v. Freeman, supra; Goldstein, supra. As the Supreme Court held in Robinson v. California, 370 U.S. 660 (1962), to punish an illness, in the absence of a voluntary act, violates the Eighth and Fourteenth Amendments.

It may be argued, of course, that a defense of "involuntariness" adds nothing to the second prong of the Freeman test -- impaired capacity to conform to the law. But incapacity to make a choice -- to exercise free-will -- precludes the existence of a voluntary act, whether or not the incapacity is the result of "mental disease or defect." Sleepwalking and hypnotism would surely not fit any conventional categories of mental disease or defect. As we have argued, the failure of Dr. Diamond to label Busic's "highly abnormal mental state" as a mental "disease" or "defect" does not preclude reliance on the Freeman defense and in no way derogates from the relevance or the admissibility of the testimony. If that contention is rejected, however, the testimony is nonetheless admissible, under instructions to acquit if the defendant's acts were not voluntary. Goldstein, supra.

V.

THE ENTIRE RESULTS OF DR. DIAMOND'S EXAMINATION ARE ADMISSIBLE

Dr. Diamond's conclusions are based in part upon information imparted to him by persons other than the defendant.

This in no way infects or inhibits the admissibility of either his conclusions or the facts upon which they are based. Rule 703 of the Federal Rules of Evidence provides that the data

> "upon which an expert based an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

In the commentary to Rule 703, it is noted that physicians often base their diganoses upon "statements by patients and relatives . . . His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."

Dr. Diamond's conclusions need not be limited to the "medical" or "psychiatric" aspects of the defendant's mental state. As the court noted in Brawner, supra, "the law cannot distinguish between physiological, emotional, social and cultural sources of the impairment . . . and all such causes may be both referred to by the expert and considered by the trier of fact." 471 F.2d at 995. See also, Blake v. United States, 407 F.2d 908, 911 (5th Cir. 1969). Indeed, in an amicus curiae brief in Brawner, the National District Attorneys Association noted that "the effects of poverty, historical factors and prejudice may well have an adverse effect upon an individual's mental condition." Id. at 995 n.47.

Dated: New York, New York
April 6, 1977

Respectfully submitted,

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March 15, 1977

Mr. Michael E. Tigar,
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Dear Mr. Tigar,

The following is a summary of my tentative evaluation of the mental state of ZVANKO BUSIC:

I examined Zvanko Busic at the Metropolitan Correctional Center, New York City, on December 14 and 15, 1976 and on February 14, 1977. I also interviewed his sister, Mrs. Zdravko Logarusic, on December 14, 1976, and his wife, Mrs. Julienne Busic, on February 14, 1977. My opinion of the mental state of Zvanko Busic is based upon my examination of the defendant, upon the information he provided me, and upon the information related to me by his sister and his wife.

It is my opinion that Zvanko Busic was in an abnormal mental state on September 10, 1976 when he is alleged to have committed air piracy, homicide, and other criminal acts. I believe his abnormal mental state existed previously, at least since January 1976 or before, and that it has persisted until the present time. It is also my opinion that this abnormal mental state was of such a quality and degree that it prevented the defendant from exercising the ordinary, reasonable and rational powers of free-will, choice and decision that constitute the intent required by the definitions of the crimes of which he is charged. Hence, I conclude that Zvanko Busic lacked the capacity for such criminal intent.

I am of the opinion that this abnormal mental state was not caused by mental disease, illness or defect. I do not find the defendant insane or mentally ill in any sense of those terms. Psychiatric examination revealed intact sensory, perceptual, memory and intellectual functions. Volitional functions are, however, disturbed; but not, I believe, as a result of mental illness. There were no hallucinations, delusions or other psychotic manifestations elicited.

Zvanko Busic talked freely to me with emotional responses of great intensity but always appropriate to the content of his thoughts. Consistently throughout my discussions with Busic he took full and sole responsibility for every detail of the planning and execution of the skyjacking. He describes the other participants as knowing nothing, of simply responding to his orders, blindly following his instructions at all times, and having no real comprehension of what was happening until it actually happened. He was, however, somewhat evasive in response to my inquiries concerning possible European connections who might have known what was planned. He seemed reluctant to allow any blame to fall upon anyone other than himself. Aside from this, Busic impressed me as being very honest, frank, sincere, and willing to communicate all details of his thoughts, behavior, and actions.

It is my opinion that the abnormal mental state of Zvanko Busic was the consequence of prolonged exposure to social and cultural factors which existed since his early childhood. These factors, when combined with realistic fears for his own life and safety, his belief that his own assassination was iminent, caused him to become fanatically obsessed with the accomplishment of what he perceived as a necessary act of patriotic, n[illegible]onalistic service to his ethnic group, the Croatians, in their str[illegible]ainst Serbian domination. He determined in adolescence to devot[illegible] to the rectification of what he believed to be the persecu[illegible] people and the wrongs against his ethnic culture. He regarde[illegible]tion of the nation of Jugoslavia as a forced, unnatural amalgama[illegible]he Serbian oppressors with his own Croatian people. At the age of [illegible]e was asked to join the Jugoslavian communist party. He refused, not because he was against communism, but because he believed the Jugoslavian communists to be wholly dominated by Serbian interests.

Busic emigrated to the United States in December 1969, settling in Cleveland, Ohio. Since then he has devoted himself to furthering the national independance of the Croations. He has pressed the cause of the Croatians and tried to reveal what he believed to be the oppression of his people by the Serbians. His European activities often involved considerable risk and he had encounters with the secret police of Jugoslavia, Germany and Austria. In 1971 he was expelled from Austria on one hour notice. He was arrested twice in Cleveland for causing a disturbance at a political meeting. On the second arrest he was found to be carrying a handgun (his life had been recently threatened) and he was fined and the gun confiscated. He had met his American wife, Julienne, in Vienna in 1969 and married her in May 1972 in Germany.

Busic states that he has always been dedicated to peaceful means of pressing his cause: speeches, writing, distributing leaflets and publicizing what he believes to be the true facts of the oppression of the Croatian people. He strongly deplored violence and has long been convinced that violence or any activity which might result in harm to anyone, friend or foe, would be immoral and detrimental to his cause.

For several years he has been aware that he might become the victim of assassination at any moment, at any place, in order to silence his protests. Since at least January 1976 he has been completely convinced that he was in iminent danger, that he would soon be killed. He believed that there was no way of indefinitely avoiding assassination by his political enemies who, he was convinced, would go to any length to silence him. He believed there were Serbian secret agents in the United States as well as in Europe, and that his time was running out. He thought they would not dare an assassination attempt in the presence of his wife who might be a witness against them. Yet, he firmly believed that they would get to him alone eventually and kill him. He estimated his own life expectancy as a year or less.

It was in this frame of mind -- a highly abnormal mental state, in my opinion -- that he determined to perform one last, meaningful, heroic act for the benefit of the Croatian cause. He felt compelled to devote his remaining life to the accomplishment of an act which would bring the attention of the entire world to the injustices imposed upon his Croatian people. To do this he planned the skyjacking with the sole intention of forcing the skyjacked plane to drop leaflets over various cities. The idea had developed slowly in his mind over a period of months.

Preparations were made to deposit a real bomb with actual explosives in the locker in downtown Manhattan. The plan was to make it appear that the harmless pseudo-bomb which he smuggled onto the plane was an exact duplicate of the real bomb in the locker. He personally bought all of the materials for the construction of both the real and the false bomb, wrote the text of the leaflets, arranged for their translation in to English and French, had them printed, purchased the airplane tickets, and took care of each detail, including the placement of the real bomb in the locker. He insists that none of the men knew anything about what was planned and that they played no part in these preparations. The printer was not informed.

The bomb placedin the downtown locker was constructed by him in such a manner, he believed, that it could be safely disarmed when discovered. There was no timing or other delayed action device. As described by Busic, it was the type of bomb which could only be detonated by someone pushing the switch, causing the bomb to explode but also killing the person pushing the switch. It was constructed in this manner so that the police who found the bomb, at Busic's direction, would believe the bomb on the plane was identical and that the skyjackers were prepared to sacrifice their own lives, if necessary.

At the same time Busic firmly believed that he had constructed the real bomb in such a manner that it could safely be disarmed by the police upon its discovery. He persists, still, in this belief and he is dismayed and remorseful that this bomb resulted in the death of a policeman. He wanted more than anything else to avoid violence and harm to anyone because of his conviction that any harm would tend to discredit his cause. Particularly, he did not want to be, or appear to be, a terrorist or criminal.

The skyjacking, the placement of the bomb in the downtown locker, and all of the complicated preparations were, in my opinion, the acts of a desperate man, in a highly abnormal mental state, acting out of fear and compulsive determination. Believing in the righteousness of his cause and in the iminence of his own death, he felt compelled to plan and perform what was to be one last heroic act: to inform the entire world of the cause of the Croatian people, language and culture. He hoped and believed that if the world were so informed it would thwart any further oppression by the Jugoslavian government and the Serbian groups, who, he believed, controlled that government.

Taking into consideration Zvanko Busic's lifelong social and cultural indoctrination, the social and political circumstances of his childhood and adolescence, his total preoccupation with the Croatian cause, the belief in the reality threat to his own life, and his obsessive and fanatical determination to perform one last act of value to his people, it seems clear to me that he lacked the mental ability to make the choice or decision to do other than what he did do. In terms of an element of criminal intent implying the power of free-will, choice and decision as exercised by ordinary men, Zvanko Busic lacked, in my opinion, the capacity for such criminal intent. He did what he did out of psychological necessity, not free choice.

I wish to examine and interview Busic at least one more time in order to reach my final conclusions regarding his mental state.

Sincerely,

Bernard L. Diamond, M.D.

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 8

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"--with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case a reasonably permitting either of two conclusions--one of innocence, the other of guilt--the jury should of course adopt the conclusion of innocence.

Based on Devitt & Blackmar § 11.14

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 9

Unless the government proves beyond reasonable doubt that the defendant has committed every element of the offense with which he is charged, you must find him not guilty.

Based on Devitt & Blackmar § 11.15

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 17

When two or more persons knowingly associate themselves together to carry out a common plan or arrangement, with the intent either to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means, there arises from the very act of knowingly associating themselves together with such intent, a kind of partnership in which each member becomes the agent of every other member.

So, where the evidence in the case shows such a common plan or arrangement, evidence as to an act knowingly done or a statement knowingly made by one such person, while the common plan or arrangement is continuing, and in furtherance of some object or purpose thereof, is admissible against all.

In order to establish proof that such a common plan or arrangement existed, the evidence must show that the parties to the plan or arrangement in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish some intended object or purpose of the plan or arrangement.

In order to establish proof that a defendant, or any other person, was a party to or member of such a common plan or arrangement, the evidence must show that the plan was knowingly formed, and that the defendant, or other person who is claimed to have been a member, knowingly participated in the plan or arrangement, with the intent to advance or further some intended object or purpose of the plan or arrangement.

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In determining whether or not a defendant, or any other person, was a party to or member of such a common plan or arrangement, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in such a common plan or arrangement must be established by evidence as to his own conduct--what he himself knowingly said or did.

If and when it appears from the evidence in the case that such a common plan or arrangement did exist, and that a defendant was one of the members of the plan or arrangement, then the acts and statements by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the common plan or arrangement, and in furtherance of some intended object or purpose of the plan or arrangement.

Otherwise any admission or incriminatory statement made or act done by one person, outside of Court, may not be considered as evidence against any person who was not present and saw the act done, or heard the statement made.

A statement or an act is "knowingly" made or done, if made or done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Based on Devitt & Blackmar § 12.10

OK

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 21

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, the jury should acquit the accused.

Based on Devitt & Blackmar § 14.18

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 27

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Based on Devitt & Blackmar § 17.01

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 30

A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

Based on Devitt & Blackmar § 17.12

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 32

You are not required to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness's bearing and demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

Based on Devitt & Blackmar § 17.21

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 34

The jury may not convict any defendant under either Count 1 or Count 2 unless it finds beyond a reasonable doubt that he or she acted with "wrongful intent," as alleged in the indictment.

In the case of the defendant Zvonko Busic, the evidence on this issue consists of the defendant's own testimony, the testimony of expert witness[es], and such inferences as you may draw from circumstantial evidence of the defendant's intent.

The term "wrongful intent" means the intention to act in a way which the particular defendant knew was wrongful. That is, the government must prove beyond a reasonable doubt that each defendant knew his conduct was in violation of the rights of others.

In order for the jury to make any such finding in this case as to Zvonko Busic, it must be satisfied beyond a reasonable doubt that he possessed the mental capacity to appreciate the wrongfulness of his conduct, to understand the nature and quality of his act, and to conform his conduct to the requirements of the law. If the evidence in this case raises a reasonable doubt as to the defendant Busic's mental capacity to form the intent required to convict of any particular charge the jury must acquit him of any count as to which it finds that he did not have such intent.

The jury should consider the evidence as to each count and each lesser included offense separately to determine whether the defendant Zvonko Busic possessed the requisite intent to commit such offense.

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 35

The term "wrongful intent" also includes wilfulness, that is the intent to do something which the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Based on Devitt & Blackmar § 14.06

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 44

If you determine that the defendant Zvonko Busic is not guilty of the offense of air piracy as charged in Count 2, or of air piracy resulting in death as charged in Count 1, either because you have a reasonable doubt as to the element of intent or for some other reason, you must consider whether the evidence justifies a verdict beyond a reasonable doubt as to some lesser offense which is necessarily included within the offense of air piracy. For purposes of this case, these lesser offenses are intimidation of or threatening a flight crew member of an aircraft and imparting false information concerning an attempted air piracy.

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 45

The offense of interfering with a flight crew member consists of the following elements, each of which must be established beyond a reasonable doubt:

First, the defendant must be aboard an aircraft within the special aircraft jurisdiction of the United States, as I have defined that term for you earlier;

Second, the defendant must intimidate or threaten a member of a flight crew of that aircraft;

Third, the intimidation or threat must either interfere with the performance by the flight crew member of his duties or lessen the ability of such member to perform his duties.

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 46

Three essential elements are required to be proved in order to establish the lesser included offense of imparting false information:

First, the act or acts of imparting or conveying, or causing to be imparted or conveyed, false information, in this case false information that the defendant possessed a live bomb aboard the aircraft;

Second, doing such act or acts knowingly;

Third, doing such act or acts with knowledge that the information so imparted or conveyed, or caused to be imparted or conveyed, is false.

Knowingly, as used in the definition of this offense, means only the knowledge that the information was false.

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 49

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes," in which each member becomes the agent of every other member. The gist of the offense, is a combination or agreement to disobey, or to disregard, the law.

Mere similarity of conduct among various persons, and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

Based on Devitt & Blackmar § 27.04

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 50

The indictment charges a conspiracy among the defendants. A person cannot conspire with himself and therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that he participated in the conspiracy charged in the indictment with at least one other person.

Based on Devitt & Blackmar § 27.12

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 51

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant--a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

Based on Devitt & Blackmar § 27.05

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 52

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and did not hear the statement made, or see the act done.

Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them.

Based on Devitt & Blackmar § 27.06

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 53

Four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment:

First: That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

Second: That the accused willfully became a member of the conspiracy;

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If the jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Based on Devitt & Blackmar § 27.08

DEFENDANT ZVONKO BUSIC'S REQUESTED INSTRUCTION NO. 54

The government must also establish beyond reasonable doubt that at least one of the overt acts as alleged in the indictment occurred while the conspiracy was still in existence.

Based on Devitt & Blackmar § 27.09

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- :

ZVONKO BUSIC, :
JULIENNE BUSIC,
PETAR MATANIC, and :
FRANE PESUT,
:
Defendants.
:
-------------------------------x

Judge Bartels

76 CR 602

DEFENDANT MATANIC'S REQUESTS TO CHARGE

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Tel. (212) 269-4900

Counsel for the Defendant
Petar Matanic

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------------------------------X

UNITED STATES OF AMERICA :

-against- :

ZVONKO BUSIC, :
JULIENNE BUSIC,
PETAR MATANIC, and :
FRANE PESUT,
:
Defendants.
:
----------------------------------X

Judge Bartels

76 CR 602

The defendant Petar Matanic submits the following requests to charge:

Request No.

1. Consider Each Defendant Separately
2. Consider Each Count Separately
3. Confession of Co-Defendant
4. Admission of Co-Defendant
5. Court's Comments to Counsel
6. Evidence of Good Character
7. Criminal Intent and Coercion
8. Court's Questions to Witnesses

REQUEST NO. 1

CONSIDER EACH DEFENDANT SEPARATELY

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him. In this respect, I caution you that you are here to determine the guilt or innocence of the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence convinces you of the guilt of some person who is not on trial, and I refer to Mark Vlasic as to whom I express no opinion of his innocence or guilt, because I have none, you are not to consider his guilt as evidence of the guilt of any of the defendants. Each one of the defendants must be judged separately by you and treated as an individual. 1 Devitt and Blackmar, Federal Jury Practice and Instructions, §§ 1106, 1109.

REQUEST NO. 2

CONSIDER EACH COUNT SEPARATELY

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged. 1 Devitt and Blackmar, Federal Jury Practice and Instructions, § 1107.

REQUEST NO. 3

CONFESSION OF CO-DEFENDANT

A confession made outside of court by one defendant may not be considered as evidence against another defendant not a party to such confession. 1 Devitt and Blackmar, Federal Jury Practice and Instructions, § 15.16.

REQUEST NO. 4

ADMISSION OF CO-DEFENDANT

An admission or incriminatory statement made or act done by one defendant, outside of court, may not be considered as evidence against another defendant who was not present and so did not see the act done or hear the statement made. 1 Devitt and Blackmar, Federal Jury Practice and Instructions, § 15.17.

REQUEST NO. 5

COURT'S COMMENTS TO COUNSEL

It is the duty of the Court to admonish an attorney, who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case. 1 Devitt and Blackmar, *Federal Jury Practice and Instructions*, § 10.12.

REQUEST NO. 6

EVIDENCE OF GOOD CHARACTER

Where a defendant has offered evidence of good character for truth and veracity, or honesty and integrity, or as a law-abiding citizen, or for peacefulness, the jury should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's good character for truth and veracity, or honesty and integrity, or as a law-abiding citizen, or for peacefulness, may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would intentionally commit such a crime.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. See generally, 1 Devitt and Blackmar, Federal Jury Practice and Instructions, § 15.25.

REQUEST NO. 7

CRIMINAL INTENT AND COERCION

Before a person may be found guilty of committing a crime, the prosecution must establish beyond a reasonable doubt that he or she intentionally committed the criminal acts charged against him or her. I stress the word "intentionally" because the law requires that in addition to there being proof beyond a reasonable doubt that the unlawful acts were committed, there must also be proof beyond a reasonable doubt that the person acted out of free choice; that he or she intended to do what they did.

A person cannot be said to have acted out of free choice where they are coerced or compelled to engage in criminal conduct by another person. Accordingly, coercion or compulsion may provide a legal excuse for the crime charged in the indictment. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present, and immediate, and of such a nature as to induce a well-founded fear of impending death or serious bodily injury; and there must be no reasonable opportunity to escape the compulsion without committing the crime, or participating in the commission of the crime. A defendant's well-founded fear for the safety of others based upon a present and immediate danger to their safety provides a legal excuse for a defendant's acts, even if otherwise they would be illegal. Acts done under such coercion or compulsion are not done willfully.

If the evidence in the case leaves you with a reasonable doubt that any of the defendants acted voluntarily, and not as a result of coercion, compulsion or duress as just explained, then it is your duty to find that defendant not guilty. See generally, 1, Devitt and Blackmar, Federal Jury Practice and Instructions, §§ 14.01, 14.16.

REQUEST NO. 8

COURT'S QUESTIONS TO WITNESSES

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts. 1 Devitt and Blackmar, Federal Jury Practice and Instructions, § 10.11.

Dated: April 5, 1977
New York, New York

Respectfully submitted,

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Tel. (212) 269-4900

Counsel for the Defendant
Petar Matanic

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---x

UNITED STATES OF AMERICA, :

:

-against-

:

ZVONKO BUSIC,
JULIENNE BUSIC, :
PETAR MATANIC, and
FRANE PESUT, :

Defendants. :

---x

Judge Bartels

76 CR 602

DEFENDANT MATANIC'S SUPPLEMENTAL REQUESTS TO CHARGE

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Tel.: (212) 269-4900

Counsel for the Defendant
Petar Matanic

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ZVONKO BUSIC,
JULIENNE BUSIC,
PETAR MATANIC, and
FRANE PESUT,

Defendants.

Judge Bartels

76 CR 602

DEFENDANT MATANIC'S SUPPLEMENTAL REQUESTS TO CHARGE

SUPPLEMENTAL REQUEST TO CHARGE NO. 1

ACCESSORY AFTER THE FACT

If upon all the evidence in the case you conclude beyond a reasonable doubt that the defendant Petar Matanic is not guilty of the charges, you must acquit him of the charges. You may still, however, conclude that the defendant Petar Matanic is guilty of being an accessory after the fact even though that crime is not charged in the indictment. Of course, in order for you to reach such a verdict all of you must be satisfied, beyond a reasonable doubt, that the evidence in the case supports such a verdict.

I will now define for you the crime of being an accessory after the fact and instruct you as to the elements of that crime.

An accessory after the fact is one who, with knowledge that an offense against laws of the United States has been committed, willfully receives, relieves, comforts or assists the offender, in order to hinder or prevent the latter's apprehension, trial or punishment.

An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Three essential elements are required to be proven in order to establish the offense of being an accessory after the fact:

First: That the defendant Petar Matanic knew that Zvonko Busic had hijacked a plane which was within the special aircraft jurisdiction of the United States as I have previously defined that term for you.

Second: That the defendant Petar Matanic comforted or assisted Zvonko Busic in order to hinder and prevent his apprehension for trial and punishment by means of the act or acts which the government alleges that he committed on the plane.

Third: That the defendant Petar Matanic did the above act or acts of comforting or assisting willfully with the specific intent to do so.

The crime of being an accessory after the fact is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or a failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

As I have stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of crime charged in the indictment; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or providing any evidence. 1 Devitt and Blackmar, Federal Jury Practice and Instructions, §§ 2103, 2104, 1403.

SUPPLEMENTAL REQUEST TO CHARGE NO. 2

FALSE EXCULPATORY STATEMENTS

[To be given in the event that the Court instructs the jury as to inferences that can be drawn from false exculpatory statements]

If you determine that the defendant Petar Matanic made false exculpatory statements after he was arrested - and I express no opinions on that score - you must bear in mind the instructions I have previously given to you concerning the offense of being an accessory after the fact. Although you may, but need not, draw an inference of guilt as to the charges in the indictment from the making of false exculpatory statements, you must assure yourselves before drawing such an inference that the statements were not made as false excuses for the separate offense of being an accessory after the fact. If you cannot so assure yourselves, then you may not consider those statements as evidence of the defendant Matanic's guilt on the charges in the indictment. However, you may, if you wish, still consider those statements as some evidence of guilt for the offense of being an accessory after the fact.

Once again, I instruct you that whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury. See United States v. Freeman, 468 F.2d 569, 574 n 9 (2d Cir. 1974).

SUPPLEMENTAL REQUEST TO CHARGE NO. 3

DEATH RESULTING (COUNT I)

In order for you to find any defendant guilty of the first count in the indictment, the count charging air piracy resulting in death, you must find beyond a reasonable doubt that the particular defendant either (1) directly participated in the making or placement of the bomb put in the Grand Central Station locker or (2) that the particular defendant knew of the existence of a live bomb prior to boarding the plane, knew before hand that the plane would be hijacked, and knew that the live bomb would be used to further the hijacking. See Memorandum of Law in Support of the Defendant Matanic's Motion for a Judgment of Acquittal on Count I Pursuant to Rule 29(a), F.R.Crim.P.

SUPPLEMENTAL REQUEST TO CHARGE NO. 4

CONFESSION OR ADMISSION, WHEN VOLUNTARY

If it appears from the evidence in the case that you are left with a reasonable doubt as to whether the alleged admissions made by the defendant Petar Matanic were voluntarily made, then you should disregard them entirely. If, on the other hand, you find that an admission was voluntarily made, then you will give it such weight as you feel it deserves under the circumstances.

In determining whether an alleged admission was voluntarily made, you may consider such factors as whether the defendant knew the nature of the offense with which he was charged, the time elapsing between the defendant's arrest and the making of the statements, whether or not the defendant was advised or believed that he was not required to make any statement and that any such statement could be used against him, whether or not the defendant had been advised prior to questioning of his right to the assistance of counsel, and whether or not the defendant was without the assistance of counsel when questioned. A request for counsel may be viewed by you as an expression by a defendant that he is not competent to deal with the authorities without legal advice.

These factors which I have enumerated for you are not conclusive on the issue of voluntariness; they are some of the factors and you are free to consider any other factors, such as the defendant's ability to understand the questions asked of him and respond, as well as the general alertness of the defendant at the time the questions were asked.

See 1 Devitt & Blackmar, §15.07; T. 18 United States Code, §3501(a)(b); United States v. Barry, 518 F.2d 342 (2d Cir. 1975). See also, Michigan v. Mosely, 423 U.S. 96, 110 n.2 (1976) (White, J., concurring opinion).

SUPPLEMENTAL REQUEST TO CHARGE NO. 65

CREDIBILITY OF ACCUSED AS A WITNESS

A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

1 Devitt & Blackmar, §17.12.[1]

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[1] Devitt & Blackmar (*id.*, at p. 550, notes) while noting that decisions in some circuits uphold the type of instruction requested by the government (request number 2), remark:

> "In spite of these holdings the authors do not recommend that the court point to the defendant's special interest. The instruction does not tell the jurors anything they do not already know, and seems to tell them to be careful about believing the defendant."

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against- 76-CR-602

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT,

Defendants.

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United States Courthouse
Brooklyn, New York

April 6, 1977
10:00 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

SHELDON SILVERMAN
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
BARRY SCHULMAN, ESQ.
EDWARD KORMAN, ESQ.

MICHAEL TIGAR, ESQ.
-and-
PIERCE O'DONNELL, ESQ.
Attorneys for Zvonko Busic

DAVID RUDOLPH, ESQ.
-and-
MICHAEL ASEN, ESQ
Attorneys for Defendant Julienne Busic

MARTIN ELEFANT, ESQ.
PAUL BERGMAN, ESQ.
Attorneys for Defendant Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Pesut

Also present:

BORIS MARUNA
Official Croatian Interpreter

opening and submitted it to the Court before his opening.

8 MR. SCHLAM: Within a half an hour.

THE COURT: If her consent to search was not required, then I must confess I can't find any real basis for reversing my prior decision.

MR. RUDOLF: Your Honor, I'm not asking to reverse your prior decision. That is what I'm saying. Your Honor ruled that that search was constitutional.

THE COURT: That's right.

MR. RUDOLF: I concede that point in my motion. I say to your Honor, in my motion, that we will concede for the purposes of that motion that it was constitutional. Nevertheless, your Honor, conceding its constitutionality, we still feel that it was the fruit of the prior illegalities.

THE COURT: Well, Mr. Korman says I can flatly say that had no consent been forthcoming, the U.S. Attorney would have direct the search to be made. Although with a warrant, not because it was required but because we have a policy of using warrants whenever time permits. If anything, her consent prevented such a search from --

MR. RUDOLF: Your Honor, all I could say in regard to that assertion is that it is my understanding,

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and perhaps Mr. Schlam can correct me, I had not received notice from any of the other counsel that any search warrants with respect to any of the defendants' luggage was ever obtained.

THE COURT: Well, he reads, he quotes from Leonard versus Howard, we close -- and I quote, "with one general observation with regard to consent to search. If the police have overreached the -- and obtained oral admissions, they have received something they otherwise would not have. As to a search, on the other hand, if the only result of the apparent consent is a premature search, suppressing the evidence because of police reliance on a faulty consent has the effect of suppressing for all time what -- but for misplaced reliance on an apparent consent, the police would have been entitled to find later. The indignant protest in the petitioner's brief calls for what might seem a highly disproportionate penalty upon the State under such circumstances."

See, so for the --"it is not surprising that in this context as well as others searches which were undertaken by law enforcement officers in release upon a warrant or consent later invalidated have been upheld on other grounds."

So there are cases. No use wasting any time.

[illegible]
4/8/77 [illegible] 2 PM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

-against- : Judge Bartels

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, and FRANE PESUT, 76 CR 602

: Defendants.

- -x

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ JUN - 1 1977 ★
TIME A.M.:
P.M.

DEFENDANT FRANE PESUT'S REQUESTS TO CHARGE

Irwin Rochman
230 Park Avenue
New York, New York 10017
(212) 685-6488
Attorney for Defendant
Frane Pesut

(182)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

-against- : Judge Bartels

76 CR 602

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, and FRANE PESUT, :

Defendants.

- -x

Attached are requests to charge based upon the anticipated evidence of the defense and the prosecution. Additional requests may be submitted as called for by new developments in the proof. References in instructions to Devitt & Blackmar are to the 1977 edition of Devitt & Blackmar, Federal Jury Practice & Instructions.

Defendant Frane Pesut joins in the requests to charge submitted by defendants Zvonko Busic and Petar Matanic.

Defendant Frane Pesut submits the following requests to charge:

REQUEST NO. 1

Identification Testimony

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the person at the time in question and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the person?

Whether the witness had an adequate opportunity to observe the person at the time in question will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(2) Are you satisfied that the identification made by the witness subsequent to the time in question was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under

which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the incident and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification.

You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

(3) You may take into account any descriptions given by a witness which are inconsistent with or which differ from the actual physical appearance of the person allegedly identified.

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant Frane Pesut not guilty of County One, and you must not consider such testimony at all in determining whether the prosecution has proven defendan Pesut's guilt beyond a reasonable doubt as to Counts Two and Thre.

Based on 1 Devitt and Blackmar, *Federal Jury Practice*, §15.19, *U.S.* v. *Fernandez*, 465 F.2d 638 (2d Cir. 1972); *U.S.* v. *Evans*, 484 F.2d 1178,1188(2d Cir. 1973); *U.S.* v. *Gentile*, 530 F.2d 461, 468 (2d Cir. 1976).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

-against- :

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, and FRANE PESUT,
:
Defendants.

- -x

Judge Bartels

76 CR 602

DEFENDANT FRANE PESUT'S SUPPLEMENTAL REQUESTS TO CHARGE

Irwin Rochman
230 Park Avenue
New York, New York 1001
(212) 685-6488
Attorney for Defendant
Frane Pesut

(153)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

-against- : Judge Bartels
76 CR 602

ZVONKO BUSIC, JULIENNE BUSIC, :
PETAR MATANIC, and FRANE PESUT,

- -x

Request to Charge No. 4 is submitted as defendant Pesut's primary requested charge on the issue of identification. Only if the Court should decline to charge as requested in Charge No. 4, then defendant asks that Request No. 1 be charged.

REQUEST NO. 4

Identification Testimony

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the person at the time in question and to make a reliable identification later.

The testimony of Mr. Gore and Mr. Bracaglia that they identify defendant Frane Pesut as being in Grand Central Station in the early morning of September 8, 1976, should be received with caution. An identification by a stranger is not as trustworthy as an identification by an acquaintance. Mistaken identification is not uncommon.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the person?

Whether the witness had an adequate opportunity to observe the person at the time in question will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(2) Are you satisfied that the identification made by the witness subsequent to the time in question was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the identification procedure under which the defendant was presented to him for identification, you should scrutinize the identification with great care. An identification procedure is any situation prior to trial in which a defendant is presented to a prospective witness for the purpose of obtaining an identification. In this case, there has been testimony concerning the showing of five photographs to Mr. Gore and Mr. Bracaglia on September 13, 1976, at O'Henry's Film Works by the police, and testimony concerning these same two persons viewing a lineup. You should consider the circumstances of any such identification procedure in determining the reliability of the witness' identification.

"Even if the police...follow the most correct identification procedures...there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual...or if they show him the pictures of several persons among which the photograph of a single such individual...is in some way emphasized....Regardless of how the initial misidentification came about, the witness thereafter is apt to retain in his memory the image of the photograph, rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification."*

Once a witness has identified someone prior to trial, he is not likely to change his testimony thereafter. In determining the reliability of the witness' identification therefore, you should consider whether the pre-trial identification procedure contained any such possibilities for suggestion which increased the danger of an incorrect identification.

---

*"We would think it reasonable that a properly drafted instruction, drawing particularly on Mr. Justice Harlan's language in Simmons, should be given if requested." U.S. v. Evans, 484 F.2d 1178,1188 (2d Cir. 1973). The quoted language above is from Mr. Justice Harlan's opinion in Simmons v. United States, 390 U.S. 383,384 (1968).

(3) You may also consider the length of time that lapsed between the occurrence of the incident and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification.

In addition, you may take into account any descriptions given by a witness which are inconsistent with or which differ from the actual physical appearance of the person allegedly identified, and also whether the witness gave different descriptions at different times.

(4) The testimony of the witness that he is positive of his identification may be considered by you, but does not relieve you of the duty to carefully consider his identification testimony. Careful scrutiny of such testimony is especially important when, as in this case, it is the only testimony offered by the prosecution which supports the claim that Mr. Pesut was present in Grand Central Station at the time in question. If, after careful scrutiny of such testimony, you have a reasonable doubt as to the reliability of the identification of defendant Frane Pesut,

you must not consider that identification testimony in any way, in other words, you must disregard such testimony completely, when determining whether the Government has established the guilt of Mr. Pesut of any count with which he is charged, beyond a reasonable doubt. Based on 1 Devitt and Blackmar, Federal Jury Practice, §15.19, Simmons v. United States, 390 U.S. 383 (1968); United States v. Fernandez, 465 F.2d 638 (2d Cir. 1972); United States v. Evans, 484 F.2d 1178, 1188 (2d Cir. 1973); United States v. Gentile, 530 F.2d 461,468 (2d Cir. 1976). See, P. Wall, Eye-Witness Identification in Criminal Cases, pp.74-83 (1965).

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

DGT:ERK:rb
F. #763251

April 8, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic, et al.
76 CR 602

Dear Judge Bartels:

I write this letter to ask Your Honor for additional time to file our written requests to charge. Mr. Schlam, who is trying this case, has been devoting his full efforts to the presentation of the evidence. Moreover, as Your Honor is aware, I have been providing him with legal backup. Apart from some early lapses, we have been diligent in promptly and fully responding to the various motions and legal arguments that have been made by the seven lawyers who appear for the various defendants.

The past two weeks have been particularly hectic for me. I have not only filed various papers in this case, including a motion to quash a series of subpoenas and a response to a suppression motion, but have prepared and argued a case in the Supreme Court of the United States, and prepared a response to a writ of mandamus in a case in which the Court of Appeals requested a response.

The non-boiler plate aspects of the instructions in this case are not at all simple, and require some careful draftsmanship. Since the defense case, which has just barely begun, is expected to take at least two weeks, and since there is likely to be rebuttal, I would ask Your Honor to permit us to have some additional time to prepare the requests.

My suggestion as to how much time depends on Your Honor's wishes. I intend to work this weekend on this case, and could, if necessary, have our requests ready by Monday afternoon or Tuesday at the latest. But, as Your Honor is aware, the defendant Busic has just filed a seventeen page memorandum relating to his defense which purports to be based on a mental condition. Although Mr. Tigar seems uncertain as to the exact nature of the defense, he is desperate to get it in as part of his strategy to confuse and conquer.

Although I believe that the arguments are nothing short of frivolous, even such discharge of a brilliant mind requires a fairly lengthy response; moreover, the issue is likely to come to a head much sooner than the issues regarding the charge. Indeed, to some extent, the nature of the charge will depend on whether the defendant is permitted to put in this particular defense.

I would, therefore, suggest, subject to Your Honor's wishes, that we file a response to the memorandum dealing with the so-called mental condition defense first, and by no later than twelve noon on Tuesday, and that we file our requests to charge by the close of business on Thursday. Should Your Honor desire the requests to charge first, then I would ask that the schedule be reversed.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

Edward R. Korman

By: EDWARD R. KORMAN
Chief Assistant
United States Attorney

cc: All counsel

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

DGT:ERK:mb
F#763,251

April 11, 1977

Honorable John Bartels
United States District Judge
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic,
No. 76 Cr. 602

Dear Judge Bartels:

I enclose a copy of what I intended would be the first part of a memorandum in support of a motion to exclude Dr. Diamond's testimony; it deals with the defense for which we received notice pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure, a defense which may loosely be characterized as one of "diminished capacity", short of legal insanity.

We believe that Mr. Tigar was aware of the inapplicability of this defense here; and accordingly, he has, in his memorandum filed last week, raised for the first time the traditional defense of insanity as explicated in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). Of course, F.R. Cr. P. Rule 12.2(a), requires pretrial notification of all intent to rely on such a defense - and, absent "cause" to excuse the default, the defendant may not now raise the defense of insanity, F. Cr. P., Rule 12.2(a). Not only was no such notice given, but Mr. Tigar personally assured me that he did not intend to raise this defense.

Aside from this, we believe that we can show that Dr. Diamond's profferred testimony does not come close to satisfying the legal standard to establish this defense. Unfortunately, because the defense came as a complete surprise to me I have not, in the limited time available, since being served with his memorandum, had an opportunity to fully research the issue and reduce our arguments to writing, although I am now prepared to argue orally.

I am advised, however, that your law clerk has asked us to be prepared to address the following argument in Mr. Tigar's memorandum:

> According to Dr. Diamond, Busic believed, and could not help but believe, that his conduct was "heroic" and "righteous." He therefore lacked capacity to appreciate the wrongfulness of his conduct. Even if he believed his acts were unlawful, he did not appreciate their "wrongfulness." Under Freeman, a belief that conduct is "morally justified" is not a belief in "wrongfulness", even if the actor knows the act to be criminal. 357 F.2d at 622, n. 52. Accord, United States v. McGraw, 515 F.2d 758 (9th Cir. 1975).

We do not need an expert to tell us that Busic believed that his conduct was "heroic" and "self-righteous". Moreover, it hardly follows from this, that he was not capable because of a mental disease illness or defect from appreciating the wrongfulness of his acts. United States v. Freeman did not say that one who believed his cause was "righteous" and "heroic", could not appreciate the wrongfulness of conduct in furtherance of his cause; instead, it adapted the rationale of Judge Cardozo's opinion in People v. Schmidt, 216 N.Y. 314, which recognized as defense an "insane delusion" that one's acts are morally justified (357 F.2d at 622, n. 22). Dr. Diamond flatly states that the defendant was not operating under any "delusions", "hallucinations" or "other psychotic manifestations". In short, as Judge Cardozo observed in People v. Schmidt, supra, 216 N.Y. at 340:

> It is not enough, to relieve from criminal liability, that the prisoner is morally depraved. Wharton, Criminal Law (11th Ed.) §63. It is not enough that he has views of right and wrong at variance with those that find expression in the law. The variance must have its origin in some disease of the mind. *** The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law. *** In such cases the belief, however false according to our own standards, is not the product of disease. Cases will doubtless arise where criminals will take shelter behind a professed belief that their crime was ordained by God, just as this defendant attempted to shelter himself behind that belief. We can safely leave such fabrications to the common sense of juries.

There is nothing in Dr. Diamond's report which lends the slightest support to the argument that as a result of mental illness or defect Busic was unable to appreciate the wrongfulness of his conduct.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

By: ______________________
Edward R. Korman
Chief Assistant U.S. Attorney

CC: Michael Tigar

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -x

UNITED STATES OF AMERICA

-against- 76 CR 602

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC and FRANE PESUT,

Defendants.

- -x

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE UNTIED STATES TO PRECLUDE THE DEFENDANT ZVONKO BUSIC FROM OFFERING THE PROFERRED TESTIMONY OF DR. BERNARD L. DIAMOND

Preliminary Statement

This memorandum is submitted in support of the application of the United States to exclude the proferred "expert" testimony of Dr. Bernard L. Daimond and in response to the memorandum on this issue filed by the defendant Zvonko Busic. Dr. Diamond supposedly will testify that (p. 1):

> "I am of the opinion that this abnormal mental state was not caused by mental disease, illness or defect. I do not find the defendant insane or mentally ill in any sense of those terms. Psychiatric examination revealed intact sensory, perceptual, memory and intellectual functions. Volitional functions are, however, disturbed; but not, I believe, as a result of mental illness. There were no hallucinations, delusions or other psychotic manifestations elicited."

Dr. Diamond, however, is of the view that, in the defendant's "frame of mind - a highly abnormal mental state, in my opinion," the defendant "determined to perform one last, meaningful, heroic act for the benefit of the Croatian cause". According to Dr. Diamond, Mr. Busic "did what he did out of psychological necessity, not free choice" (p. 4).

This is all there is to Dr. Diamond's report when it is shorn of the self-serving statements of the defendant Zvonko Busic and Dr. Diamond's wholly inadmissible conclusion that "Zvonco Busic lacked the capacity for *** criminal intent." (p. 2).

A. Introduction

1. On February 23, 1977, prior to trial and long after the time prescribed by F.R.Crim.P., Rule 12.2(b) for giving notice of such a defense, the defendant Zvonko Busic filed a notice of an intention to rely upon a defense based upon a mental condition. Rule 12.2(b) provides:

> "If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate." _/

_/ The united States waived its objection to the late filing on the condition that it be promptly furnished with Dr. Diamond's psychiatric report.

The advisory committee notes indicate that "[t]here is some disagreement as to whether it is proper to introduce evidence of mental disease or defect bearing not upon the defense of insanity, but rather upon the existence of the mental state required by the defense." Accordingly, the advisory committee observed that Rule 12.2(b) "does not attempt to decide when expert testimony is admissible on the issue of the requisite mental state" and "provides only that the defendant must give pretrial notice when he intends to introduce such defense."

2. The defense of which the defendant gave notice pursuant to F.R.Crim.P., Rule 12.2(b), which we shall refer to as a "diminished capacity" defense, for the sake of convenience, is separate and distinct from the traditional insanity defense for which special notice must be given pursuant to F.R.Crim.P., Rule 12.1(a). Indeed, the so-called mental condition defense, of which the defendant gave notice of his intent to rely, assumes the defendant was aware that his act was wrongful and that he was able to control his conduct; it is limited to admitting expert testimony regarding "a mental condition ***, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime - even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration." United

States v. Brawner, 471 F.2d 969, 998 (C.A.D.C. 1972). As the Court of Appeals continued in Brawner (471 F.2d 1002, n. 75):

> "Assuming the introduction of evidence showing "abnormal mental condition," the judge will consider an appropriate instruction making it clear to the jury that even though defendant did not have an abnormal mental condition that absolves him of criminal responsibility, e.g., if he had substantial capacity to appreciate the wrongfulness of his act or to control his behavior he may have had a condition that negatives the specific mental state required for a higher degree of crime, e.g., if the abnormal mental condition existing at the time of the homicide deprived him of the capacity for the premeditation required for first degree murder."

Of course, as this definition indicates, if all that is required to establish the defendant's guilt for a particular crime is the general criminal mens rea, i.e. that the defendant acted knowingly and wilfully [see, e.g., United States v. Howard, 506 F.2d 1131, 1133 (C.A. 2, 1974), the defense is not applicable because it assumes that the defendant was not suffering from an abnormal mental condition which prevented him from acting knowingly and wilfully. Only when the statute requires a specific intent beyond the general mens rea is the defense pertinent. As the Supreme Court of Delaware recently observed in McCarthy v. Delaware, decided February 9, 1977 (Slip op. pp. 6-7, copy attached):

> " * * * As previously noted, the salient aspect of the diminished responsibility doctrine is that it does not relieve the defendant of criminal responsibility. Like 'extreme emotional distress', it is a defense of mitigation only.

> Fuentes v. State, Del.Supr., 349 A.2d 1 (1975). Criminal responsibility exists, but only for an offense for which the general mens rea can be found. In practice under the doctrine, while conviction for an offense requiring a specific intent was foreclosed, conviction for a lesser-included crime, requiring only a general criminal intent, was not. This specific intent - general intent dichotomy explains not only the application of the doctrine in the first degree murder cases wherein the specific intent element of premeditation and deliberation are negated, see State v. DiPaolo, supra.; State v. Giamenz, Iowa Supr., 126 N.W.2d 285 (1964), but also the seemingly more liberal application of the doctrine in cases such as assault and battery with intent to kill, Bimbo v. State, Ind.App., 315 N.E.2d 738 (1974); first degree forgery, requiring specific intent to defraud, State v. Conklin, Wash.Supr., 489 P.2d 1130 (1971); assault with intent to commit murder, State v. Welsh, Wash.App., 508 P.2d 1041 (1973); and entering a building with intent to commit theft, People v. Taylor, Cal.App., 33 Cal.Rptr. 654 (1963). In each of these instances, the requisite specific intent constituted an aggravating factor to an otherwise general mens rea offense and the doctrine was applied to permit a finding of the lesser offense."

3. Moreover, even where the defense is applicable, there are fairly strict procedural rules which must be followed - as the Court of Appeals for the District of Columbia, the opinions of which are the leading cases in this area, made clear.

As Judge Leventhal observed in United States v. Brawner, supra, 471 F.2d at 1002, "[t]he receipt of this expert testimony to negative the mental condition of specific intent requires careful administration by the trial judge" (471 F.2d at 1002):

> "Where the proof is not offered in the first instance as evidence of exonerating mental disease or defect within the ALI rule the judge may, and ordinarily would, require counsel first to make a proffer of the proof to be adduced outside the presence of the jury. The judge will then determine whether the testimony is grounded in sufficient scientific support to warrant use in the courtroom, and whether it would aid the jury in reaching a decision on the ultimate issues."

This caveat was only recently reemphasized in United States v. Peterson, 509 F.2d 408, 414 (C.A.D.C. 1974), where the Court of Appeals observed:

> "To capsulize, the threhold issue therefore is the classic question of relevancy. As with any piece of evidence, the trial judge is called upon to weigh the probative versus the potential prejudicial nature of the evidence proffered. The judge must determine whether the evidence is sufficiently grounded in scientific fact and whether it directly addresses the mental element at issue so that its introduction will not unduly distract or mislead the jury from the determination it must make. See generally McCormick on Evidence §§ 184-85 (2d ed. 1972)."

Where the expert testimony contains "vague scientific reasons" and is "not directed at negating a particular mental capacity so much as it [is] offered as a justification," it may not be admitted. United States v. Bennett, 539 F.2d 45, 53 (C.A. 4, 1976).

4. With this as a backdrop, we proceed to examine the nature of the offenses with which the defendant is charged and the proferred testimony and show that this case is not one where the defense alluded to by F.R.Crim.P., Rule 12.2(b)

is applicable; that the self-serving declaration of the defendant Zvonko Busic contained in Dr. Diamond's report plainly shows that he acted knowingly and wilfully and that there is not a shred of scientific support for Dr. Diamond's diagnosis, other than "vague scientific conclusion."

Indeed, we believe that the defendant's able trial counsel has anticipated that, despite his usual resort to the law of piracy, Black's Law Dictionary and impressive latin maxims, he could not meet the Brawner standards for the Rule 12.2(b) defense. So that, at the last minute, in the middle of the trial, and without the prior notice required by F.R. Crim.P., Rule 12.1(a), he now seeks to justify the admission of Dr. Diamond's testimony to support the traditional defense of insanity as explicated in United States v. Freeman, 357 F.2d 606 (C.A. 2, 1966). Since no notice was given for this defense, and indeed, Mr. Tigar personally assured me that he did not intend to offer such a defense, the testimony may not be admitted for this purpose. Moreover, it is apparent that Dr. Diamond's testimony will not support any such defense.

In short, it is apparent from these wholly inconsistent justifications for Dr. Diamond's testimony, that what the defendant seeks to do is introduce wholly irrelevant testimony relating to the defendant's background and motives, for the purpose of thoroughly confusing the jury and to gain their sympathy. It should not, as we show, be admitted for this purpose.

B. The Inapplicability of The Rule 12.2(b) Defense To The Charges Here In Issue

1. Section 1472(i) does not require any specific intent beyond the general mens rea required to convict a defendant of a criminal offense. See United States v. Bohle, 445 F.2d 54, 60 (C.A. 7, 1971). It makes it an offense to commit aircraft piracy which is defined as "any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States." The words "wrongful intent" imply no more than the general mens rea required for any serious crime, i.e. that it was done "knowingly and wilfully" [United States v. Howard, 506 F.2d 1131, 1133 (C.A. 2, 1976)]. Of course, as we have shown, the defense referred to by Rule 12.2(b) assumes that a defendant possesses the capacity to act knowingly and wilfully. See United States v. Brawner, supra.

Contrary to the defendant's claim (Memo. pp. 4-6), Section 1472(i),unlike the crime of piracy on the high seas, does not require an "intent permanently to deprive the owner of the ship." Quite obviously, those who commit the crime of airpiracy do not do so with the intent to permanently deprive the owner of the ship; the principal evil at which the statute was directed was the extreme danger to lives and property which result when an aircraft is seized in midair under the circumstances described regardless of whether the defendants have an "animus furandi." While the defendant's counsel continues to be enamored with the principles governing the crime of piracy on the high seas, he ignores the statement in the House Committee Report accompanying the bill ultimately enacted into law, that

> "There is not intention *** that the meaning and interpretation of this subsection shall be influenced in any way by precedents or interpretations relating to piracy on the high seas."

1968 U.S. Code Cong. & Admin. News, p. 2567.

Moreover, the "death resulting" clause of Count I likewise requires no specific intent as to which Mr. Diamond's proferred testimony is at all relevant. Unlike a traditional murder case, the death need not be deliberate, premeditated, knowing or wilful, nor need the defendant have been directly responsible for it. See United States v. Guilette, 547 F.2d 743, 749 (C.A. 2, 1976). Under these circumstances, the defense is plainly inapplicable. _/ Similarly, the conspiracy count

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_/ In United States v. Brawner, supra, 471 F.2d at 1002, n. 75, the Court of Appeals held that the diminished capacity defense was not applicable to release the defendant of responsibility for second-degree murder which is predicated on a death caused by reckless conduct where the defendant has an "awareness of a serious danger to life and displayed wanton disregard for human life." (471 F.2d at 998, n. 53).

which, of course, is a lesser included offense, of the substantive offense with which defendant is charged, requires only that he did knowingly and wilfully enter into a conspiracy to seize the aircraft, as those terms are generally defined; but such capacity is assumed by nature of the defense.

Moreover, there is simply nothing in Dr. Diamond's report to suggest that once Mr. Busic "determined" to commit the offense - to use Dr. Diamond's words, he was incapable of entering into a conspiracy with others to carry it out; or that he was incapable of perceiving the risks inherent in playing with live bombs. On the contrary, the defendant's self-serving statements regarding the care taken in the preparation of the bomb, plainly show that he was aware of the danger that it could explode and kill someone. In short, while the defendant may have decided to do what he did because of his "social and cultural indoctrination, the social and political circumstances of his childhood and adolescence, his total preoccupation with the Croatian cause [and] the belief in the reality [sic] threat to his own life", it is unclear - Dr. Diamond's legal conclusions aside, - how that prevented him from acting knowingly and wilfully or perceiving the ordinary risks that may arise from planting a bomb, even one not intended to go off, or entering into a conspiracy to accomplish the crime he "determined" to commit.

2. Moreover, this brings us to the final objection to Dr. Diamond's testimony, and that is the absence of any scientific support to warrant its admission. Dr. Diamond tells us that:

> "I am of the opinion that this abnormal mental state was not caused by mental disease, illness or defect. I do not find the defendant insane or mentally ill in any sense of those terms. Psychiatric examination revealed intact sensory, perceptual, memory and intellectual functions. Volitional functions are, however, disturbed; but no, I believe, as a result of mental illness. There were no hallucinations, delusions or other psychotic manifestations elicited."

What then was wrong with Mr. Busic - and what do we learn from Dr. Diamond's special expertise that requires such testimony. Surely most people would conclude with Dr. Diamond that individuals, who are fanatically devoted to nationalistic causes and who carry out illegal and violent acts to draw attention to thier cause, are not "normal" as that term is used in vernacular. They are, no doubt "fanatical", "desperate" and "obsessive", and like most human beings, they act of "psychological necessity." But the diminished capacity defense, which F.R.Crim.P., Rule 12.2(b) refers, was not intended to permit a jury to turn a defendant lose merely because he has the abnormal tendencies of a person capable of committing the offense. United States v. Brawner, supra, 471 F.2d at 1001.

Indeed, if upbringing, "social and cultural indoctrination", "total preoccupation" to a nationalistic cuase, and the fear of death or possible apprehension by one's adversary, is a defense to airpiracy and acts of terrorism, simply because a psychiatrist can be found to say that "in his opinion" the defendant's state of mind is abnormal, then the United States will become a haven for terrorists of all kind.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 76-CR-602

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANJO PESUT, :

Defendants. :

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United States Courthouse
Brooklyn, New York

April 11, 1977
10:30 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

JOSEPH BARBELLA
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
BARRY SCHULMAN, ESQ.
EDWARD KORMAN, ESQ.
Assistant U.S. Attorneys

MICHAEL TIGAR, ESQ.
-and-
PIERCE O'DONNELL, ESQ.
Attorneys for Zvonko Busic

DAVID RUDOLPH, ESQ.
-and-
MICHAEL ASEN, ESQ.
Attorneys for Defendant Julienne Busic

MARTIN ELEFANT, ESQ.
PAUL BERGMAN, ESQ.
Attorneys for Defendant Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Pesut

Also present:

BORIS MARUNA
Official Court Interpreter

AFTERNOON SESSION

MR. BERGMAN: Your Honor, Mr. Rudolf and Mr. Asen indicated to me that they might be delayed coming back this afternoon. If it's all right with the Court, I will send for Mrs. Busic.

THE COURT: All right.

Very well, both of you are going to argue or just one?

MR. TIGAR: I think we will both be doing it, your Honor, if that is all right with the Court.

THE COURT: That's all right with me.

MR. O'DONNELL: Thank you, your Honor.

THE COURT: Very well. Mr. Tigar, I will listen to you.

MR. TIGAR: If your Honor please, this is a case which is very much like United States v. Dwyer in this Circuit, in which —

THE COURT: The United States v. Dwyer, as I recall, confirmed the principles laid down by the United States v. Freeman. And in that case we are talking about insanity, not mental condition.

MR. TIGAR: No, your Honor.

THE COURT: All right.

MR. TIGAR: I beg to disagree with the Court.

THE COURT: I beg to disagree with you.

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(Addressing law clerk.) Get Dwyer and Freeman.

MR. TIGAR: The language I was referring to in Dwyer, your Honor, is the language that we quoted in our memorandum dealing with the critical character of the evidence concerning --

THE COURT: What page of your memorandum?

MR. TIGAR: Pages 2 and 3, your Honor. And I was citing Dwyer for the broader proposition that evidence --

THE COURT: In Dwyer they tend to defend on the grounds of insanity. You say, no. I will show you the case.

MR. TIGAR: My reference to Dwyer, if your Honor please ---

THE COURT: Let me get it again, Mr. Tigar.

MR. TIGAR: All right.

THE COURT: Pages 2 and 3, did you say?

MR. TIGAR: Pages 2 and 3 about a memorandum, yes.

THE COURT: I don't see it.

MR. O'DONNELL: Bottom of the page.

THE COURT: That's the top paragraph O'Donnell, it begins on the bottom of page 2 over to page 3.

THE COURT: Oh, I see. Yes. But that was an insanity defense.

MR. TIGAR: There was an insanity defense tendered in that case, your Honor. The relevancy of Dwyer here is that the defense in Dwyer was the sole issue upon which Dwyer chose to defend. And so here your Honor, we have a critical question which indeed I think would not be stretching the fact to say, with the exception of the issue of venue, may very well turn out to be the sole defense that we decide to present to this jury.

Now, there are two ways in which that defense, it seems to us, may be presented.

THE COURT: Well, let's go — just a minute. Let's stick with Dwyer. I can't find any suggestion in Dwyer in support of your statements.

I am quoting now from — I think this is Judge Van Graafeiland.

There can be little question but that the testimony of Dr. O'Connell was relevant. Indeed, it was critical.

I think that's in connection with the defense of insanity.

By structuring his defense as he did, Dwyer admitted the criminal conduct alleged. His only hope for acquittal was his asserted lack of criminal responsibility. To this end, expert testimony that defendant suffered from a mental disease or defect was vital. See United States v. Freeman.

In your case your expert does not admit that there was any mental disease or defect. And in the Dwyer case, that was — as well as in Freeman, that was vital.

Now, proceed.

MR. TIGAR: If your Honor please, we cited the Dwyer case because it has to do with the general issue of relevancy when a defense of mental condition is introduced.

THE COURT: We have to know what we are talking about. We just can't talk about mental condition in general. We have to know what type of mental condition you're talking about.

Let's go to Rule 12B2.

MR. TIGAR: 12.2B.

THE COURT: Yes. I don't have it right here. You must quoted it.

MR. TIGAR: Yes, we do.

THE COURT: Where is that?

MR. TIGAR: Let me pass up the rule, if the Court wishes to look at our copy.

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THE COURT: Yes. It's as good as any other copy, isn't it?

MR. TIGAR: Well, it's published by West Publishing Company. I assume they are about as reliable as we are likely to find.

THE COURT: It says, if the -- yes, I have underscored that phrase, other condition, as well as you have. I thought it might --

MR. TIGAR: Well, at least, then we are together in focusing on the same statutory language.

THE COURT: We don't have anything specific, though, Mr. Tigar. We have a great number of cases here. And, of course, we have clear guidelines for the defense of insanity, which you are not interposing.

MR. TIGAR: We are not interposing that.

THE COURT: But you are interposing a defense of diminished responsibility in fact, I think.

MR. TIGAR: I would not term it a defense of diminished responsibility. We are looking at the Brawner case, your Honor.

THE COURT: Yes.

MR. TIGAR: Mr. Schlam cited once upon a time that that was a Second Circuit case.

THE COURT: No. It's --

MR. TIGAR: It's a DC Circuit case but we did agree that it was authoritative.

THE COURT: Mental condition, though insufficient to exonerate, may be relevant to specific mental element of certain crimes or degrees of crime.

That's really what you are talking about.

MR. TIGAR: Yes. The two paragraphs following the language that your Honor quoted at page 998 --

THE COURT: Our decision accompanies the redefinition of when a mental condition exonerates a defendant from criminal responsibility with the doctrine that expert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime -- even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration.

Some of the cases following this doctrine used the term diminished responsibility, but we prefer the example of the cases that avoid this term -- for its convenience is outweighed by its confusion; our doctrine has nothing to do with diminishing responsibility of a defendant because of

7 his impaired mental condition, but rather with determining whether the defendant had the mental state that must be proved as to all defendants.

Procedurally, the issue of abnormal mental condition negativing a person't intent may rise in different ways.

Well. I am not going to go into those different ways, but I think that is the -- I think that's the essence of your defense.

MR. TIGAR: That is the nub of it, your Honor.

THE COURT: Now, why don't I listen to Mr. -- I will hear you later. You can come back. I want to hear what --

MR. TIGAR: I simply wanted to cite the paragraph of Dr. Diamond's letter, which it seems to me establishes --

THE COURT: But Dr. Diamond's letter will never get in in its present state. I will tell you that.

MR. TIGAR: Dr. Diamond's opinion is that he lacks this capacity.

(Continued on next page.)

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THE COURT: He can't use it that way. is for the jury to decide, whether he lacks specific intent. But I will let Dr. Diamond testify to some of the facts in his letter, but he is not going to decide what the jury should decide. Now, that is very important as far as I can see. And now, let me look at his letter. I have marked several pages and maybe I might not after I listen to Mr. Korman. He says you're not entitled to any of it. I may not — I may be convinced not to let any of it in.

MR. TIGAR: Yes. If your Honor please, our reference to that portion of the letter — just so our record is complete — rests on the Federal Rules of Evidence 704 —

THE COURT: I read that.

MR. TIGAR: Which says an expert may give an opinion on the ultimate issue.

THE COURT: All right. Let me hear —

MR. O'DONNELL: If I might add one other thing, Mr. Tigar's refernce to the opinion of Dr. Diamond particularly tracks what your Honor read from Brawner. That is, it is his opinion — I am quoting from the first page of the letter which is attached to our memorandum.

Quotes, this abnormal mental state was of such quality and degree that it prevented the defendant from exercising — et cetera.

THE COURT: I read that. I went over it very carefully. He said it in another place.

MR. TIGAR: There is one other.

THE COURT: He said it in two places in his opinion.

MR. O'DONNELL: At least two.

MR. TIGAR: If your Honor please, there is one other point — I think your Honor has brought it out in your questions to me, but I want to make it clear this is not a 12.2(a) defense. Our citation of Freeman —

THE COURT: You made that very clear. You don't —

MR. TIGAR: I resent the implication in Mr. Korman's letter that we misled him.

THE COURT: In fact, you couldn't under Dr. Diamond's letter insert it anyway because he says he has no mental defects; is that right?

MR. TIGAR: That's right. And I only mentioned it because Mr. Korman seems to think we misled him. And, of course, we did nothing of the sort.

THE COURT: All right. That was quick.

All right, Mr. Korman, let's hear you.

MR. KORMAN: I'm certainly happy, Judge, that I don't have to do another memo on a 12.2(a) defense.

THE COURT: Why can't portions of that letter come in, or at least in the form of Dr. Diamond's testimony pursuant to the provision of Brawner that I have just read to you.

MR. KORMAN: Well, I think, first of all, Judge, we have to take a look at Brawner and to what extent this is a defense.

THE COURT: All right. Now, let me see.

MR. KORMAN: I think we have to start off with the basic supposition that Brawner does not say —

THE COURT: Can you wait until I get it?

MR. KORMAN: Sure.

THE COURT: All right, I have it. Of course, Brawner is not a Second Circuit case either.

MR. KORMAN: Well, it's true it is not the Second Circuit, but the decision is a fairly well-regarded one in that respect.

THE COURT: And it comes from an excellent — a very fine judge.

MR. KORMAN: From an excellent judge.

But I don't think, quite frankly, that the case at all is applicable here. And that is, this mental deficiency defense is never intended to provide complete exoneration to a defendant.

THE COURT: I think -- when you are talking about specific intent -- maybe you are going to use it, but you are talking about general mens rea. Is that the answer to your argument?

MR. KORMAN: Yes. As a matter of fact, in the heading of Judge Leventhal's opinion at 998, this defense was insufficient to exonerate, which means to let him out on the street.

"may be relevant to specific mental element of certain crimes or degrees of crime."

Now, what he's obviously talking about is crimes that require something more than the general mens rea, because he said that he could not have the specific mental state required for a particular crime or the degree of crime, even though he was aware that his action was wrongful and was able to control it, and, hence, was not entitled to complete exoneration.

THE COURT: Well, --

MR. KORMAN: Now, we submit that that is all that the statute requires.

THE COURT: Well, that's — that is really the question, isn't it?

MR. KORMAN: I think —

THE COURT: Simply, does it require specific intent.

MR. KORMAN: I don't understand —

THE COURT: Or simply require a general intent.

MR. KORMAN: And you might point out to me, if you can on sudden notice, instances of crimes that require specific intent as compared to those which require only a general mens rea. Well, I think they are spelled out in the quotation from that Supreme Court of Delaware —

THE COURT: That bothered me because I thought that was the — the Supreme Court of Delaware was predicated upon the statute.

MR. KORMAN: No. They speifically said, Judge, that they ignored the statute completely and considered the merits of the claim.

THE COURT: Well —

MR. KORMAN: And that Warner itself was such a case where it was over and above the general criminal —

THE COURT: What was Warner?

MR. KORMAN: A murder one case that was

6 reduced to murder two because of the lack of premeditation. And the Court said that he was not to be relieved of responsibility for murder in the second degree because that did not require anything more than a general criminal intent.

THE COURT: Why doesn't —

MR. KORMAN: All —

THE COURT: — air piracy require specific intent?

MR. KORMAN: Because I think we have to look at what the statute says. Any seizure or exercise of control.

THE COURT: Not wrongfully.

MR. KORMAN: It says wrongful intent. And in United States v. Howard, Second Circuit case, which dealt with the exact same phrase in the context of a bank robbery, they said wrongful intent means knowing and wilful general criminal mens rea.

THE COURT: That's — let me look at that. That's in your memorandum.

MR. KORMAN: We have quoted it on page 3 of our memorandum, 506 F. 2nd 1133.

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THE COURT: Wait a minute. What page?

MR. KORMAN: Page eight of our memo, Judge.

THE COURT: Yes.

MR. KORMAN: And there is —

THE COURT: You cited United States versus Bohle.

MR. KORMAN: I cited Bohle because Bohle said that specifically with respect to the air piracy statute. I cited United States versus Howard because Mr. Tigar in his memo said he had to resort to Blacks Law Dictionary to find a definition of wrongful intent and I found one in a Second Circuit case which said, "Wrongful intent means knowingly and willfully. All it requires is a general criminal intent." And the underlying assumption of this defense that Brawner recognizes is that he's capable of exercising such a general criminal intent.

THE COURT: Well, what you say is, you only have to have a specific intent when there are two levels of the offense involved, so you can drop down from the specific intent to the general intent, first degree, second degree murder?

MR. KORMAN: That's correct. The Supreme Court of Delaware goes so far as to say that unless there is some lesser included offense, they're not even going to let him out even if the statute has a special intent requirement. I don't have to go that far because we are dealing here with a statute that has no special intent requirement. All it says is that he has to act with wrongful intent. Quite clearly all congress intended was that he act knowingly and willfully. And unless he's prepared to insert that -- assert that he was legally insane, there is no -- there is no basis for the conclusion that he could not form this requisite intent.

I mean -- that -- the underlying assumption of the -- of this defense is that he's legally insane, that he's capable -- to use Judge Leventhal's words, "of understanding that his act was wrongful and he was able to control it."

THE COURT: Well, you have Brawner which talks about mental condition though insufficient to exonerate may be relevant to specific mental ailment of certain crimes or degrees of crime and you say that is only available when you have two levels.

MR. KORMAN: That's correct.

THE COURT: One, general intent to do wrong and the other is the specific intent to do -- to commit a specific crime.

MR. KORMAN: For a specific -- in the context of the murder case, to act with a premeditation that is required for murder in the first degree, but it doesn't let you go because you can still be convicted of murder in the second degree which only requires what Judge Leventhal spoke of as the -- this general criminal intent.

THE COURT: What about robbery which results in a death?

MR. KORMAN: That -- the death resulting is even less of a general intent statute because the death resulting under the holdings of the Court of Appeals doesn't have to be deliberate, it doesn't have to be intended. It doesn't have to be knowingly and willful.

THE COURT: Felony murder case, is that what you're talking about?

MR. KORMAN: It is a kind of felony murder case and to this at least to this extent it is similar, but it does not have to be the death -- the death does -- what I'm saying is that even less of an intent required -- for the death resulting part.

THE COURT: Resulting?

MR. KORMAN: That's correct.

THE COURT: It could be phrased differently. Then of course you'd have to have the specific intent.

MR. KORMAN: That comes down to a question of legislative determination, but I would say that less is required for the resulting in death than it is for the offense from which death must result.

THE COURT: That is a question that Mr. Tigar has argued very vociferously to the contrary, that he says it must be some definite foreseeability and reckless disregard of life.

MR. NORMAN: That is not a general criminal intent. As a matter of fact, in Brawner, the second degree murder defense that the -- offense which the court said that this mental condition defense was not applicable to was just this kind of reckless statute, if you take a look at the footnote, Judge, at

THE COURT: Where?

MR. NORMAN: Page 1002, footnote 75. The last full paragraph of the footnote.

THE COURT: Yes.

MR. NORMAN: The third full paragraph where it says, "Since the defense relates to a specific mental ailment of a crime, it is not applicable to malice established on an objective standard in a case of second degree murder," citing to note 53. If you look at note 53, he's talking about a crime which death results from a reckless act where there is a serious danger to life and where — and where wantonness for human life is displayed.

5 And there is another even more basic reason and that is, there is nothing, not a shred, no evidence from Diamond's report to suggest that Mr. Busic wasn't aware that the bomb could be dangerous or might explode. Everything in that report bespeaks of a mind aware of the danger.

All of Mr. Busic's self-serving statements show that he was aware that bombs were dangerous, that they could explode. He says he didn't want it to explode. The note which he gave the pilot cautioned, care.

We are not — this particular point I think points up another defect in many of the legal arguments that Mr. Tigar made. He's so anxious to get this defense in that he finds any case that is remotely relevant and never really attempts to tie it to what his expert is going to say. I mean, there is not a shred of support in Dr. Diamond's letter which suggest that Mr. Busic was not capable, was not aware of the danger of bombs. Everything in it suggests that he was.

THE COURT: All right. Do you have anything to say, Mr. Tigar?

MR. TIGAR: Yes. Just as a beginning observation your Honor, United States against Howard is a case

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that the court may want to take a look at, because in fact --

THE COURT: I have it right here.

MR. TIGAR: The statute involved there does not contain the word wrongful intent. Wrongful intent is the Court of Appeals paraphrase of the statutory language.

THE COURT: I thought I read that phrase here?

MR. TIGAR: Yes, but it is not contained in the statute, your Honor. In the bank robbery statute.

THE COURT: All right.

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MR. TIGAR: That's important because our research indicates that the Air Piracy Act is the only statute in the entire Federal Criminal Code as brought up to date and put in the the Lexus (phonetic) computer which contains the words "wrongful intent".

THE COURT: Wrongful --

MR. TIGAR: Wrongful intent appears in no other statute in the United States Code.

To our knowledge or to the computer's knowledge I should say. Now, that leads --

THE COURT: What difference is there between wrongful intent and mens rea because that's all mens rea means?

MR. TIGAR: Wrongful intent is a kind of mens rea.

THE COURT: It's a wicked mind. Isn't that true? Isnt that the same as wrongful intent or an intent --

MR. TIGAR: Yes. Mens rea -- well, wrongful intent says the Government at page 8 of its memorandum means knowkingly and willfully.

Of course the Court knows that in an income-tax evasion case, under 26 United States Code, Section 7201, the element, the mental element is willfulness and we cite cases here indicating that

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THE COURT: No. That's a case where people could act I think in ignorance, not knowing that.

MR. TIGAR: Could also act involuntarily your Honor and that's what we point out at page 15 and page 16 of our memorandum. That the mental condition about which Dr. Diamond has given his opinion underlies or is the basis for a finding by the jury which is after all the body that has to decide this issue of involuntariness.

THE COURT: Did you look at United States versus Malinowski, 472 Fed. 2d, 850. That's a Third Circuit. Certio rari was denied at 411. United States 970. There the defendant protested the Viet Nam War by submitting a false exemption certificate to the IRS and he was convicted. He claims on appeal that his altruistic purpose and intent prevented his conviction for "willfully" making a false statement because he had no evil purpose or any bad purpose, and the charge actually given was unusual in that the District Court instructed the jury as to the defendant's theory of the type of intent and willfulness needed to convict, then rejected the theory and gave his interpretation of the law to the jury this way, to interpret the term willfully to require a bad purpose is to confuse the when willfulness is an issue, psychiatric testimony is admissible.

Similarly, in cases of failing to report for induction, the willful failure to report for induction, the willful failure to report is the offense defined by 50 United States Code, Section 462, and we cite United States against Baird for the proposition that where willfulness is an issue, psychiatric testimony is admissible on the intent element.

I point out —

THE COURT: Just a minute. Now, you are going to the question of voluntary act, aren't you?

MR. TIGAR: No, your Honor.

THE COURT: If —

MR. TIGAR: Defining the intent element.

THE COURT: Let's not become confused here. Are you saying that the act of entering the plane and hijacking it could be by accident and not willful? Unwillful?

MR. TIGAR: I'm saying that it was not willful, your Honor, in the sense in which willfulness is used in criminal statutes such as income tax evasion and failure to report for the draft.

I am referring to —

concept of intent, with that of a bad motive.

The statutory requirement of willfulness is satisfied if the accused act intentionally and with knowledge that he was breaching the statute. Now, while I permitted evidence to be introduced concerning the defendant's motive, whatever motive may have led him to do the act, the act is not relevant to the question of the violation of the statute, and that was approved, affirmed and cert denied.

MR. TIGAR: Yes, your Honor. The case is like Malinowski and there is another one from the Fourth Circuit called Barrigan.

THE COURT: Yes. Father Berrigan.

MR. TIGAR: And some others your Honor are not relevant to the issue we have here. We don't claim that the defendant is excused by virtue of what may have been altruistic. We claim, rather that he lacked by virtue of the factors outlined in Dr. Diamond's letter the intent as it is defined in Malinowski and as it is defined in the case that we cite in our memorandum.

That underlies our defense.

THE COURT: Let me say this to you. There of course can be no objection to Mr. Busic getting

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on the stand and saying he didn't have that intent. He has a right to so testify as to the condition of his mind. But to have an expert, a paid expert, to come here and tell the jury what was in Mr. Busic's mind and what he — what intent he had, at least to give an opinion, is just confusing. Very confusing under the circumstances.

And I don't think — I am not too sure it is admissible. Isn't the mental condition here that — in my opinion, is required by Brawner and certainly you cannot satisfy United States versus Freeman. You don't purport to satisfy that.

MR. TIGAR: Freeman did not involve the kind of a defense that we have here, your Honor.

THE COURT: No. Freeman involved defense of insanity and you couldn't satisfy it unless you had your doctor say that he has a mental disease or defect and that he was suffering from a delusion that what he was doing was morally proper, even though it was legally wrong; is that right?

MR. TIGAR: I agree with your Honor's statement. I come back, however, to the point that where — Rule 702 of the Rules of Evidence, which Code defies the practice in the Federal Courts permits the Court to —

THE COURT: Let's see. What are the advisor's notes on Rule 7?

MR. TIGAR: To introduce expert evidence if it will assist the triers of the fact to understand the evidence or determine the fact in issue.

THE COURT: That's all.

MR. TIGAR: In Brawner the Court will recall that the United States Court of Appeals cites a number of decisions described by other Courts.

As a matter of fact, in the process of the jury making up its mind in some of those decisions cited in Brawner, not only was a psychiatrist's testimony introduced, but it was the testimony of this very same psychiatrist.

I don't think by the way it makes any difference whether psychiatrist is paid or not. I assume the Government will pay its psychiatrist.

THE COURT: Well, it certainly doesn't make him very impartial, does it?

MR. TIGAR: Has your Honor ever been in a case in which an expert witness, called by one party or another, as opposed to a Court's expert witness claimed to be thoroughly free, thoroughly impartial?

THECOURT: I don't think we asked him.

MR. TIGAR: My point is your Honor, that ours

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is an adversary system.

THE COURT: It's almost — it's almost essential. Ours is an adversary system but your particular expert doesn't believe in the adversary system.

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(Outside the presence of the jury.)

MR. TIGAR: He does, your Honor. He is the author of a leading article on the meaning of the adversary procedure.

THE COURT: Author of an article where he thinks this opinion ought to be outside the adversary procedure. I will give you the citation. In fact, you gave it to me.

MR. TIGAR: Your Honor, he's the author of the Archives of Criminal Psycho-Dynamics —

THE COURT: No, this is one Professor Louis Sell.

MR. TIGAR: David Louis Sell wrote it together with —

THE COURT: And they indicate they thought his opinions would be outside of the adversary procedure.

Let me go back to your case of Runa.

MR. TIGAR: The first paragraph of the Advisory Committee's notes strike me as relevant —

THE COURT: Ishould have it here.

MR. TIGAR: I have a copy here. Do you want me to hand it up to the Court? It begins on the bottom of 702-1, your Honor.

(Pause.)

MR. TIGAR: Your Honor, the Government has retained a psychiatrist. I assume if Dr. Diamond testifies the Government psychiatrist will testify and we will just have to do the thing that has been done in the law ever since the inquest by compurgation began in the 13th century. The jury has to make up its mind.

THE COURT: I recall that, not that I was there. But there is an issue as to how this is a proper case for an expert opinion. That is what Mr. Korman says.

MR. TIGAR: We cite cases in which psychiatric evidence has been customarily offered and received.

THE COURT: I know that. I presided at many a trial.

MR. TIGAR: In this case, Page 2 of the memorandum, we list some of them including some aircraft piracy cases.

THE COURT: There is only one that I read and the nature of that testimony wasn't on intent, was it?

MR. TIGAR: What is that?

THE COURT: That aircraft piracy case you cited where expert testimony was received. I don't think it was on the intent.

MR. KORMAN: It was a traditional insanity case, Trapnell was one.

THE COURT: That is right, that was in this Court.

MR. TIGAR: Those are not the cases we cite. Brawner indicates psychiatric testimony is essential or admissible rather, regardless of whether or not you are making what is now a 12.2A or 12.2B. How else in the world would we be able to make the argument to the jury unless we had the light that the expert could shed?

THE COURT: He's getting on the stand in this case and therefore you have a different setup --

MR. TIGAR: I assume he will get on the stand, your Honor, and the opportunity would exist in a 12.2A defense --

THE COURT: It always did, but not often exercised.

MR. TIGAR: In order for the jury to be able to interpret -- that is what Rule 702 talks about -- and understand the testimony of the defendant which sheds light on his own intent, the testimony of the psychiatrist, as the Brawner Court points out, is the key.

THE COURT: If you are looking for a specific intent. If general intent is all thatis involved, it is not -- I am inclined, Mr. Korman, to permit some testimony to be introduced but not in accordance with Dr. Diamond's letter.

I would permit him to say that in his opinion Zvonko Busic was in an abnormal mental state when he committed these air piracy acts.

MR. KORMAN: To what would that be relevant to, your Honor?

THE COURT: That would be relevant to the question of whether ther[illegible]uld be a specific intent necessary. It's not clear, Mr. Korman, that you are right that wrongful intent under the context of this case doesn't mean generally mens rea.

MR. KORMAN: What more can it possibly mean? Mr. Tigar says it was the same intent required when a piracy of a ship exists. That is ridiculous.

MR. TIGAR: That is one of the three arguments we make in an attempt to explore the entire issue.

THE COURT: Ihave some ability to screen what is good from that which is bad. I threw that out very rapidly into the sea where it belongs.

MR. KORMAN: What else is it relevant to?

THE COURT: It is a question of whether you are right or wrong. If you are wrong —

MR. KORMAN: I cited the case in point, Boyles. All that is required is general intent.

THE COURT: Wait a minute. The Boyles case is not an air piracy case.

MR. KORMAN: Yes, an air piracy case.

THE COURT: What is the citation?

MR. KORMAN: 445 F. 2nd.

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MR. TIGAR: In Boyles the holding of the case is you don't need —

MR. KORMAN: That was the only conceivable specific intent they could conjure up.

MR. TIGAR: We will take willfully in the sense it is used in an income tax prosecution.

THE COURT: An income tax prosecution case is not analgous to this type of case. You can forget to file your income tax and can be ignorant of the requirements that you must meet in filing the return. But you can't be ignorant of what you are doing when you put your foot on an airplane and carry in your bosom a false bomb. That has to be done willfully.

You doubt that, Mr. Korman?

MR. KORMAN: NOt at all. As a matter of fact, I think the words "with wrongful intent" in the statute are redundant. I don't think you can lawfully seize an airplane in flight —

THE COURT: That is a good argument for Mr. Tigar. It shows if it wasn't some specific intent, why put it in.

MR. TIGAR: If Congress meant, according to the Morsetti, has never drafted a criminal statute permit somebody to put someone in jail for life for —

MR. KORMAN: If you read the statute, it doesn't say the acts have to beknowingly and willfully, those words are encompassed with the words wrongful intent.

THE COURT: It's a close case, Mr. Korman, in the sense that the statute does use wrongful intent.

I am not too sure it means mens rea or some type of specific intent I can't define.

MR. KORMAN: How are wegoing to let the expert testimony in? It has to be put in the charge with relation to this offense. That's why we claim it is not relevant.

I am not arguing that psychiatric testimony is never admissible in a case.

THE COURT: It can be placed in the charge as all other expert testimony is.

MR. KORMAN: What is the relevancy of this?

THE COURT: The relevancy is this, he said he had an abnormal mental condition.

MR. KORMAN: He doesn't even say that. He said "state" whatever that means.

MR. TIGAR: Dr. Diamond will testify "state and condition" are identical.

MR. KORMAN: He was reading 12 B.2 instead of operating on his —

MR. TIGAR: You will have a chance to cross-examine.

THE COURT: It will indicate he didn't have any intent to commit air piracy.

MR. KORMAN: But the very reason they are admitting that for, unless his claim is a traditional insanity — if you read 998 of Brawner, he didnot have the specific mental state required for a particular crime for degree of crime even though he was aware that his acts were wrongful and was able to control it and hence is not entitled to complete exoneration.

MR. TIGAR: We don't claim he is entitled to complete exoneration. We submitted lesser included offense —

MR. KORMAN: You are not raising that as a defense, an attempted interference with the flight crew —

MR. TIGAR: That is right.

MR. KORMAN: What is the difference between the two of them?

MR. TIGAR: The statute — we submitted a careful charge, your Honor, --

THE COURT: Wait a minute. Are you saying that the Doctor's testimony would be admitted only in connection with Count 1?

MR. TIGAR: No, your Honor. Let me make our intention perfectly clear, as a famous man once said, so there is no misunderstanding. We are not saying that Mr. Busic is entitled to complete exoneration. We are saying, under Count 1, the resulting in depth, if the Court looks at the third full paragraph on Page 3 of Dr. Diamond's letter there was a lack of appreciation of the dangerousness of the conduct.

THE COURT: That is forseeability.

MR. TIGAR: Count 2 --

MR. KORMAN: Where does Dr. Diamond say that?

MR. TIGAR: Page 3.

MR. KORMAN: Busic didn't think the bomb was going --

THE COURT: Wait a minute. What paragraph?

MR. KORMAN: The third.

MR. TIGAR: Third full paragraph.

THE COURT: The bomb placed in the --

MR. TIGAR: The next paragraph.

THE COURT: At the same time he believes he had constructed the real bomb in such a manner that it could safely be disarmed by the police upon its discovery.

MR. KORMAN: Are we going to admit psychiatric testimony that the defendant made a bomb he thought couldn't explode?

THE COURT: No. There are a lot of things in here he will not get in as long as I am presiding. This is obviously an effort to have the Doctor decide the whole case.

MR. KORMAN: It is irrelevant.

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MR. TIGAR: May I finish my offer? I want to make sure the record is clear.

With respect both to Count 1 and Count 2, Dr. Diamond's testimony would establish that a defendant was incapable of forming the wrongful intent specified in Section 1474 of Title 49, although the jury could find him guilty. That is Dr. Diamond's testimony would leave open that possibility of a lesser offense, included offense, with the flight crew or bomb hoax.

MR. KORMAN: I don't understand. Interference with the flight crew requires it be willful.

THE COURT: What part of the statute is that offense delineated?

MR. KORMAN: This is going to be another show because what they are trying to do is to get a lesser included offense charged in a situation where we are going to show is wholly improper. They claim interference with the flight --

MR. TIGAR: There is no essential of wrongful intent required for the offense of interfering with the flight crew under 1472J.

THE COURT: Did you ask for that in your instructions?

MR. TIGAR: I did. As a lesser included offense. We are tracking the classic Brawner situation.

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THE COURT: You are not at all, in my opinion.

MR. TIGAR: It is our contention --

THE COURT: Mr. Tigar, I appreciate your efforts butnow I see a little more clearly what this strategy involves. And I don't think that Dr. Diamond's testimony is going to be, if I permit any of it into evidence, that I am going to admit, anything that will just permit a lesser offense such as interference with the crew other than an air piracy offense.

That will not be, nor will I so instruct the jury. I can tell you that right now.

A testimony is clear and unequivocal, in my opinion, that it was not a mere interference with the crew.

You mean to tell me when there is a seizure of a plane that is hijacked that all you have here is an interference with the members of the crew? Is that your position?

MR. TIGAR: I am telling the Court that the offense defined by Section 1472J is within the fair reading of the statute and within the intention of Congress that lesser included offense be contained within the offense.

THE COURT: A lesser included offense, but not on the facts or testimony adduced in this case.

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MM. TIGAR: I respectfully ask the -- I respectfully submit to the Court that the decision as to whether or not the jury finds that the lesser-included offense rather than the greater offense charged has been committed is for the jury to make, and that we are entitled to have that theory submitted to the jury, and that in making up its mind, the jury is entitled to consider the testimony of Dr. Diamond which is outlined in some detail in the letter which is attached to our memorandum and which bears upon the issue of wrongful intent which is an element of the greater offense, 1472(i) and is not an element of the lesser offense, 1472(j).

MR. KORMAN: I can't believe that I am listening to --

MR. TIGAR: Just a minute.

THE COURT: You have to let him finish.

MR. KORMAN: This statute --

MR. TIGAR: Could we --

THE COURT: Let him finish.

MR. TIGAR: May I move to suspend Mr. Korman's disbelief?

THE COURT: No. Go ahead.

MR. TIGAR: Just until I finish.

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The elements of wrongful intent, continuing, which is an element of the greater offense, but which is not an element of the lesser offense defined by 1472(j). That is our position with respect to counts 1 and 2.

THE COURT: It's almost like saying that one should charge the jury in a bankrobbery case so that the lesser offense of trespass could also be included and the jury could find trespass instead of a bankrobbery. Isn't that something like that?

MR. TIGAR: No, your Honor, it isn't like that. Because there is no federal statutory offense of trespass with respect to --

THE COURT: I am not sure. It is with respect --

MR. TIGAR: With respect to a national bank, but not a federal reservation. If the robbery took place on a federal reservation and if the jury found that the defendant entered the bank -- if the defendant didn't rob the bank at all, that the teller just thought that the defendant wanted the money and started handing it to him --

THE COURT: Just like that.

MR. TIGAR: Then -- pardon me?

THE COURT: It would just be a trespass.

MR. TIGAR: It might very well be a trespass. Each case has its own facts.

THE COURT: Now, do you agree to all this?

MR. KORMAN: I think it's a lot of nonsense. First of all, to interfere with a flight crew is a crime that carries a penalty of up to twenty years in jail. I could hardly believe that Mr. Tigar is suggesting that before somebody is convicted of that offense the Government is not obligated to prove that he acted with a general criminal intent, that is, that he acted knowingly and willfully. As a matter of fact, if you read the Howard case, the statute, as I recall, the Court of Appeals was concerned with the provision of the bankrobbery statute which didn't contain the words, with wrongful intent. But the Court of Appeals read it in because it's a serious crime. And you don't convict somebody of a serious crime unless they acted with a wrongful intent. That is, knowingly and willfully.

THE COURT: Well, could he not get on the plane and make up his mind later to interfere with the crew and not have any wrongful intent to actually hijack the plane?

MR. KORMAN: Of course that is so. But we are not talking about any attempt. We are talking about an actual offense. Under Mr. Tigar's offense, if a passenger bumped into a stewardess, presumably he could be interfering with the flight crew because you don't have to prove that he acted willfully and without any criminal --

MR. TIGAR: That is not the argument.

THE COURT: No. But there, Mr. Tigar -- let's face the facts. Inteference with a flight crew would not include seizing and taking control of a plane and ordering the plane to be taken to Montreal and Ganda and Iceland and London, and if that's just interference with a flight crew, I'd like to know what hijacking is.

MR. TIGAR: Well, if your Honor please, the defense of hijacking contains two elements, not only the seizure and exercise of control which your Honor refers to, as to which there's been evidence. It also includes a mental element because wrongful intent -- we claim that since this statute in addition to other arguments, since this statute, air piracy under 1472(i) is a kind of felony-murder statute, that as indicated in the United States v. Lily, which we cited in our memorandum in support of our jury charges, and as indicated by the case we cited in our memorandum on this issue, that this crime requires the kind of intent as to which the Brauner case makes clear that Dr. Diamond's testimony would be relevant. Surely, there must be some criminal intent.

THE COURT: Wait a minute. You keep making those broad statements. But you don't answer Mr. Korman's argument, that Brauner was talking about a case where you require just specific intent and not general mens rea, whereas this case doesn't require specific intent, but also only requires wrongful intent. You skip that completely all the time.

MR. TIGAR: I don't skip that. Your Honor, the Brauner case was decided in the context of a -- the gradation of criminal homicide so familiar to the law. However, the gradation of homicide, as dealt with in Brauner does not exhaust those crimes in the criminal code in which the defendant's intent to do X, Y or Z tends to define the gradation of proper punishment.

THE COURT: That's right.

MR. TIGAR: And different --

THE COURT: And they --

MR. TIGAR: And different gradations of offenses.

THE COURT: You come back to the fundamental principle or issue of what kind of intent was required for air piracy. You say it's specific, and Mr. Korman says it's just general mens rea. That's it.

At least, your Honor, there must be a conscious awareness of the --

THE COURT: that's for the jury to decide.

MR. KORMAN: If he wasn't consciously aware of what he was doing because of some mental illness, then raising the dramatic defense of -- and I quote for the umpteenth time, -- this defense concedes that the defendant was aware that his act was wrongful and that he was able to control it. Now -- and that he was able to control it concedes that. Now, if you are saying that you don't come within this, then you're raising the dramatic defense of insanity because that's what the definition is, because of mental condition or disease.

THE COURT: He had elucidated that he was morally right.

MR. KORMAN: That's right.

THE COURT: And he didn't know --

MR. KORMAN: Now, he doesn't want to raise that defense for whatever reason, even though he devoted about three or four pages of his memorandum to it and he has withdraw that defense. If we assume that he's not legally insane, then we have to assume that he was able to appreciate the wrongfulness of his act, and two, to conform it to the law. IF he can do that, he can conform it to the traditional general criminal intent. Now, if they want to raise the defense of insanity, we have a whole load of argument on that to deal with.

MR. TIGAR: If your Honor please, page 6 of our memorandum we cite a case of Judge Blackman, Second Circuit case, Holdridge, holding that a specific intent is required in a criminal statute unless the statute does not mention any intent. Unless the penalty is relatively small and a conviction does not gravely besmirch, the statutory crime is not taken over from the common law and Congressional purpose is supporting. I respectfully say that --

THE COURT: I have to read the facts of that case. I haven't read --

MR. TIGAR: That's the Holeridge case. Now, we have a copy of that which we would be pleased to hand up to the Court.

MR. KORMAN: Judge, that is talking about the manner in which Judge Blackman is using the words, specific intent, in that case to describe the general criminal and specific criminal intent. Obviously, the case is where he suggests that it doesn't apply where the penalty is relatively small, conviction does not gravely besmirch, the statutory crime is taken off from the common law kind of crime which traditionally doesn't require a knowing and willful act. This is simply playing with words. I haven't, quite frankly, read the Holdridge case, but I would venture to say that the specific intent that they are talking about is simply the specific intent to which is acting knowingly and willfully. That's the general mens rea.

MR. TIGAR: I don't have a Xerox copy of that case, your Honor. The library is closed.

THE COURT: All right.

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MR. TIGAR I think that Mr. Korman risks, if his argument is accepted, overriding a rather important distinction in the law. The term specific intent, which is held in cases such as draft evasion cases that we cited at page 2 or 3 of our memorandum to be included by use of the term wilfulness in a felony context. Now, there is another kind of wilfulness, your Honor, that comes up in misdemeanor cases. But the wilfulness used in a felony context is specific intent. Now, that specific intent which is encompassed within the term wilfulness differs from the general intent that is required for less serious sort of offenses.

THE COURT: You see, we have before us what the most -- as to most that Dr. Diamond could testify to. And as I read it, it's simply an opinion which is based largely on what Mr. Busic told him.

MR. TIGAR: How else would he arrive at an opinion.

THE COURT: There are a number of ways. Predicated upon his past actions over many years. Predicated upon objective evidence. Also by clear conduct over the years. None of that is here. We have here him talking to Mrs. Busic and then he talks to Mr. Busic's sister. Then he goes on and tells just what his opinion is predicated upon those statements. Now, you see what is happening here is in the first place, one can even agree on -- although I certainly haven't made up my mind that I do agree -- that a specific intent is necessary to find aircraft piracy offense, and yet not permit Dr. Diamond to testify. Because it's going to be nothing else but an opinion that -- as I see it, that is going to be unreliable. And we have him decide what the intent was since he's going to decide what the jury should decide.

MR. TIGAR: No, your Honor. That's goes to weight.

THE COURT: You read this letter. I certainly wouldn't under any circumstances, if I agree with everything you said, would I let him testify along -- the trouble is, Mr. Tigar, you have asked for too much. You went too far. It is not going to happen that way.

MR. TIGAR: If your Honor please, I have two observations about what the Court remarked. The first is that the question of reliability of psychiatric technique is a proper matter for cross-examination once an expert is qualified on the stand as an expert. If he testifies, as he will, that the

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means by which h reached these conclusions are means which are customarily accepted in the profession as reliable means for making such judgment --

THE COURT: That's what the rules require.

MR. TIGAR: And he will --

THE COURT: I don't know who's going to testify that these means are reliable means and are accepted in the profession.

MR. TIGAR: Dr. Diamond will testify to that.

THE COURT: Well then, he pulls himself up by his own bootstraps. But let me say this, that what is happening here is an effort to reduce the indictment from air piracy to a lesser offense of interference with the crew members by the use of Dr. Diamond's testimony, isn't it?

MR. TIGAR: If the jury believes Dr. Diamond's testimony, your Honor, they would be permitted to find such a thing.

THE COURT: Well, I will consider it, gentlemen, but, no, we -- I have tried many cases and we call them down the middle, Mr. Tigar.

MR. TIGAR: May we have a ruling before the Court leaves today because the Court's ruling will have a dramatic impact upon the future course of our defense. Because, your Honor, this is our defense.

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THE COURT Well, it can't be your whole defense. Your whole defense? Is it your whole defense?

MR. TIGAR: It is, your Honor.

THE COURT: Dr. Diamond's testimony is your defense?

MR. TIGAR: Your Honor, Dr. Diamond's testimony-

THE COURT: In other words, anything that Mr. Busic says would not --

MR. TIGAR: No, I didn't say that. Dr. Diamond's testimony, and Mr. Busic's testimony, which would establish the predicate for Dr. Diamond's testimony, is the basis of our defense to Count 2 and Count 3 of this indictment. There are other matters of defense such as venue.

THE COURT: Also a defense to Count 1.

MR. TIGAR: There is a defense to Count 1.

THE COURT: No. Dr. Diamond's testimony.

MR. TIGAR: But what I am attempting in my observations to the Court -- to answer the Court's question, and I am saying to the Court that aside from the issue of venue, and aside from perhaps on Count 3, some failure of proof on conspiracy, Dr. Diamond's testimony and the testimony of the defendants which is its necessary predicate is our

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defense.

MR. KORMAN: Judge, that sounds very dramatic. But the fact is that it's no legal defense. And if Mr. Tigar is serious, I will be prepared to let him reserve the issue if he wants to plead guilty. That's how little I think and how ridiculous I think that defense is. And he's trying really to scare you by saying these words in a dramatic way, your Honor, "This is our defense."

THE COURT: You have --

MR. KORMAN: And if that is to somehow show --

MR. TIGAR: I want to watch the performance from over here, your Honor.

THE COURT: Mr. Korman, how many lawyers have scared me in the past?

MR. KORMAN: Very few, Judge.

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MR. TIGAR: I don't think I have scared your Honor at all during this case and I certainly did not intend to now.

THE COURT: No, but it is a tantalizing question. It is a tantalizing question. I would like to decide it correctly. You gentlemen, Mr. O'Donnell, sit down there for a minute.

MR. TIGAR: I was going to quote Judge Weinstein to you.

THE COURT: Quote him.

MR. TIGAR: "Doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusion."

THE COURT: I agree with that general statement. No one can dissent to that general statement, but it is not applicable in a matter of this kind. It is not that easy. What I am thinking about, gentlemen, is whether Mr. Korman -- you have any other case distinguishing mens rea or wrongful intent from specific intent. That is the only thing that bothers me. The rest doesn't bother me at all.

MR. KORMAN: I don't think -- Brawner is one that does quite clearly and quite clearly supports our position. I think Mr. Tigar's problem, to tell

2 you the truth, is that for some reason he doesn't want to raise the traditional defense of insanity and once you accept it -- once you -- and did not want to timely raise it and once you accept the proposition that he is not insane, that is that he had capacity to know what he was doing, that he knew it was wrong and to conform it to the conduct of -- conform his conduct to the law, then he acted with the general intent that the statute requires. That is, he acted knowingly and willfully.

THE COURT: I won't mind.

MR. CORMAN: That is the basic problem that he has, that is, I don't want to quote from Brawner again. It assumes that he could have at least formed that general intent and it relieves him of criminal responsibility, whether because of an abnormal mental condition he can not formulate something more than that. And there is nothing the statute -- that this particular statute requires more than that.

THE COURT: I won't have any objection to Dr. Diamond testifying along those lines.

MR. TIGAR: What lines are those?

THE COURT: Well, that he could not -- that he did not have the capacity to form the general intent of committing the offense.

3 MR. KORMAN: Because of a mental illness or defect and that is the traditional defense of insanity which we were told would not be raised here.

MR. TIGAR: That is not --

THE COURT: But not a mental illness or defect.

MR. KORMAN: That is what underlies that statement. It has -- Brawner made it clear, JUdge. I will quote you from the charge.

THE COURT: You have this mental condition set up. How do you meet that, Mr. Korman? The Brawner formula?

MR. KORMAN: The Brawner formula is met here because all we have to show here is that he acted knowingly and willfully and that he wasn't insane legally in that he acted knowingly and willfully.

THE COURT: That doesn't necessarily follow either.

MR. TIGAR: No, your Honor, we cited some authority for the proposition that that doesn't follow at all.

MR. KORMAN: Which ones are those?

MR. TIGAR: U.S. against Holdridge and then the cases which are cited at page 2 of our brief, Levy, Scheller, Baird, Strutton. It's like we used to say about a bird-doggy -- doesn't follow at all.

MR. KORMAN: You?

THE COURT: I am perfectly willing for the doctor to testify that the defendant had an abnormal mental condition. That is his opinion.

MR. TIGAR: That is his opinion.

THE COURT: That is all.

MR. KORMAN: To what end?

THE COURT: To the end that he wasn't aware that his act was wrongful.

MR. KORMAN: That is not what -- that is the defense of insanity, Judge.

THE COURT: I am afraid you are right. You are right. I don't think I can. I tried to make some concession to doctor -- to Mr. Tigar, but I don't think I can. So my decision is I won't permit it.

MR TIGAR: And your Honor, excuse me. May we I want to be clear about the Court's ruling. The Court's ruling then that the defendant would not be permitted to testify as to the matters which would form the predicate or Dr. Diamond's opinion.

THE COURT: Oh, no, the doctor can testify. Absolutely.

MR. TIGAR: What can he testify as to?

THE COURT: Anything he wants to testify to, that is within relevancy. He can talk about his own mental condition if he wishes. I see no objection to that at all.

MR. BERGMAN: Would your Honor have any objection for Dr. Diamond to testify that by reason of his abnormal state, Mr. Busic had an extreme --

THE COURT: I don't know who he represents but he has been here all during the trial.

MR. BERGMAN: Your Honor, this is relevant evidence. I don't think that it has to necessarily come from a witness that we would be calling initially.

THE COURT: Mr. Bergman, when I make decisions, you are the only one that doesn't accept it.

MR. BERGMAN: Your Honor, I have a client to represent.

THE COURT: I told you that two or three times before.

MR. BERGMAN: Your Honor, I was never given the opportunity to speak. I thought the Court was going to reserve decision but in view of the fact that it is not I just want to make the record clear.

Dr. Diamond is -- it is my understanding, would testify that by reason of his abnormal mental condition or state, whatever you want to call it, that Mr. Busic had a desire for a psychiatrist and that consistent with that abnormal state, Mr. Busic would not tell the people who he was taking along with him on the flight -- what was going to happen.

THE COURT: No. Now, I think I understand -- you understand that ruling? Dr. Diamond is not going to testify.

MR. BERGMAN: I want --

MR. TIGAR: If your Honor please, one last matter as a procedural matter. In order to complete our record, we would like to ask Dr. Diamond to testify as to his qualifications and to his opinion on the basis for the -- outside the presence of the jury.

MR. KORMAN: I'll stipulate to his qualifications Judge.

MR. TIGAR: Excuse me. Outside the presence of the jury.

THE COURT: You can bring in his curricula vitae and put it in evidence too.

MR. TIGAR: If your Honor would prefer not to take court time with that, I will obtain a court reporter and I will let the Government know when and where I intend to do it and I will ask him --

THE COURT: Will it be anything different from the long list of qualifications?

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MR. TIGAR: It will be more precise and extensive.

MR. KORMAN: He could put that in in writing Judge. It's a waste of time. He could put that in in writing.

THE COURT: Why don't you do that, Mr. Tigar? It's going to be --

MR. TIGAR: I will make an offer of proof then, since the Court is not disposed to hear this testimony outside the presence of the jury. By means of getting a court reporter and asking Dr. Diamond to say what he would have testified to and I'll have that certified and marked in evidence as our offer of proof.

THE COURT: What he would have testified to as an offer of proof. I thought you were going to talk about his qualifications.

MR. TIGAR: His qualifications and his testimony.

THE COURT: All right.

MR. TIGAR: Yes, your Honor.

THE COURT: You can do that.

MR. ROCHMAN: Your Honor, excuse me?

THE COURT: Yes?

MR. ROCHMAN: Again, all the defendants join in both applications.

THE COURT: Absolutely.

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

--x

UNITED STATES OF AMERICA, :

Plaintiff, :

-against- : INDEX NO. 76-CR-602

ZVONKO BUSIC, JULIENNE BUSIC, PETER MATANIC, FRANJO PESUT, :

:

Defendants.

:

--x

Deposition of

DR. BERNARD L. DIAMOND,

taken by the Defendant, Zvonko Busic on April 12, 1977 at 8:00 a.m., at 136 East 55th Street, New York, New York before Edward Harrison, a Shorthand Reporter and Notary Public within and for the State of New York.

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BY: MICHAEL E. TIGAR, ESQ.,
PIERCE O'DONNELL, ESQ.,
Of Counsel

oOo

DR. BERNARD L. DIAMOND,

called as a witness by the Defendant, was duly sworn by the Notary Public (Edward Harrison), and was examined and testified as follows:

MR. TIGAR: This is a question and answer offer of proof under oath pursuant to oral notice given in open court yesterday afternoon at which time the attorneys for the United States were notified of the time and place of this session and have their right to be present. They have not appeared.

EXAMINATION BY MR. TIGAR:

Q Dr. Diamond, will you state please your present profession or occupation?

A Yes, I am Professor at School of Law and in the Health and Medical Science program of the University of California, Berkley and a Clinical professor in the Department of Psychiatry at the University of California Medical Center in San Francisco.

Q And will you tell us please, sir, your education training background and experience?

A Yes, I am a physician licensed in the state of California. I graduated from the University of California of medical school in 1939.

I did my internship and residency training in psychiatry at the Neuropsychiatric Institute of the University of Michigan.

I also was trained and graduated from the San Francisco Psychoanalytic Institute in 1952.

During World War II I spent approximately five years as a psychiatrist in the United States Army Medical Corps. I was in private practice for Psychiatry and psychoanalysis from 1946 to 1964 and since 1964, I have been on the full time faculty of the University of California.

Q Are there some particular fields of psychiatry in which you have particular qualifications sir?

A Yes. For many years I had a special interest and specialized in the psychology, sociology and criminology of crime, criminal behavior, forensic psychiatry and the interface of the behavioral sciences with law.

Q Will you describe, sir, what your teaching duties have been at the University of California since you became a member of the faculty there?

A From 1964 to 1976, I was a full Professor of Criminology and a Professor of Law. In 1970 to 1971 and again in 1976 -- I'm sorry, 1974 to 1976 I was acting dean of the School of Criminology.

The School of Criminology closed in July of 1976 and since then I've continued partially in the Law School and partially in the Health and Medical Sciences Program. In that program, I am director of the Mental Health Option of the Health and Medical Sciences program.

Q Doctor, have you given testimony in court on prior occasions in criminal cases concerning the mental state of a defendant?

A Yes, I have.

Q On approximately how many occasions, sir?

A Perhaps several a year for the last 25 yea

Q And at the request of the defense in this case, did you have occasion to conduct an examination into the mental conditon of Zvonko Busic?

A Yes, I have.

It occurred to me in response to your previous question that I should say that I've had some special experiences with the kinds of social and psychological problems posed by the present case.

Q Will you describe those please?

A Yes. In addition to teaching courses in the psychology of crime, I have also been responsible for the teaching of university courses at Berkley in all aspects of the causation of crime, including social and cultural factors. In addition to being qualified in psychiatry, I believe I am also qualified as to the sociology of crime. Some 15 years or more ago, when I was accepted for membership in the American Sociological Association, I was given full fellowship standing as a Sociologist. I am also a member of the American Criminalogic Society which is primarily concerned with the sociology of crime.

During 1975 to 1976, I was a member of the National Executive Board of that organization.

I am now a member of the Editorial Board for the journal "Criminology" which is the official organ of the American Criminologic Society. I have participated in the trials of a number of cases related to the problems presented by the present case and had the opportunity in those cases for extensive examination and research.

I was an expert witness for the defense in the trial of Sirhan Sirhan for the assassination of Robert Kennedy.

I was involved in the trial of the Black Panther, Huey Newton. I was the principal defense witness in a skyjacking trial in 1973 in Los Angeles and I've had extensive experience with draft evaders, agitators, terrorists and others starting with the student disturbances on the Berkley campus in 1964.

I was a consultant for the so-called Hubbard studies on skyjackers in 1971.

I believe all this is relevant to my conclusions, information that I gathered in relationship to the present defendant.

Q Doctor, will you tell us please, what you did in connection with your inquiry into the mental condition of the defendant?

A Well, I personally examined Zvonko Busic at the Metropolitan Correctional Institution in New York City on Decemb er 14th and 15th, 1976, and on December 4th, 1977.

I also interviewed his sister, Mrs. -- I'd better spell it. Z-d-r-a-v-k-o L-o-g-a-r-u-s-i-c, on December 14th, 1976 and the defendant's wife, Mrs. Julienne Busic on February 14th, 1977.

My opinion of the mental state of Zvonko Busic is based on my examination of the defendant, upon the information he provided me and upon the information related to me by his sister and wife.

Q Will you tell us please, what your conclusion is as a result of that examination?

A It is my opinion that Zvonko Busic was in an abnormal mental state on September 10th, 1976 when he is alleged to have committed air piracy, homicide, and other criminal acts.

MR. TIGAR: Off the record.

(Discussion off the record.)

A I believe the abnormal mental state existed previously, at least since January, 1976 or before, and then it has persisted up to the present time. It is also my opinion that this abnormal mental state was of such a quality and degree that it prevented Zvonko Busic from exercising the ordinary reasonable and rational powers of free will, choice and decision that constitute the intent required by the definitions of the crimes of which he is charged.

Hence, I conclude that Zvonko Busic lacked the capacity for such criminal intent and that he did not, in actuality have that intent..

It is my opinion that this abnormal mental state of Zvonko Busic was not caused by mental disease, illness or defect. I do not find the defendant insane or mentally ill in any sense of that term. I find no signs or symptoms of previous history of mental illness.

Psychiatric examination revealed intact sensory perceptual memory and intellectual functions. There were no hallucinations, delusions or other psychotic manifestations with the possible exception of a single idea which he expressed to me which could be paranoid in nature, which I will talk about further.

He talked to me freely with emotional responses of break in intensity, but appropriate to the content of his thoughts.

Q Continue, please, Doctor.

A Consistently throughout my discussions with Zvonko Busic, he took full and sole responsibility for every detail of the planning and execution of the skyjacking.

He described the other participants as knowing nothing, of simply responding to his orders, blindly following his instructions at all times and having no real comprehension of what was happening until it actually happened.

I am of the opinion that the abnormal mental state of the defendant, Busic, was a consequence of prolonged social and cultural factors which existed since his early childhood. These factors, when combined with realistic fears for his own life and safety, caused him to become fanatically obsessed with the performance of what he perceived a necessary act of patriotic nationalistic service to his ethnic group, the Croatians, in their struggle against Serbian domination.

The defendant's childhood background is most relevant. He was born January 23rd, approximately, 1946, in the small village of Gorica in a

Croatian area of Yugoslavia.

Q Gorica, Doctor, is spelled G-o-r-i-c-a?

A Yes.

He was the third of eight children, six remained alive, of peasant farmers. His parents are now alive and living in the same village. Their life was one of great poverty and chaotic social conditions.

From earliest childhood, he was exposed to a flood of information including many "horror stories" concerning the conditions of the occupation of his region of the country by the Germans in World War II and the subsequent oppression by Serbians and by what he was taught to believe was the total domination of the Communist Yugoslavian government by the Serbs.

By early adolesence, he became prepensely preoccupied by the issue of survival by the nationalistic identity of the Croatian people and particularly the survival and purity of the Croatian language.

The grade school nearest to his village was of mixed Serbo-Croatian character. In his 7th Grade he had the opportunity to transfer to a purely Croatian school. He attended that school even though he had to walk 9 kilometers each way, to and from school, often in the bitter cold.

After attending the Croatian school for the one year, he was forced to transfer back to the Serbo-Croatian school because of a ruling that his residence was not in the proper district. He was angry and resentful that this was required and he continued to study and read about everything he could find concerning the Croatian nationalism movement and what he regarded as the contamination of the Croatian language by Serbian words.

He was determined to devote his life to the rectification to what he believed to be the persecution of his people, the distortion of his ethnic history and the contamination of his national language

He regarded the formation of the nation of Yugoslavia as an unnatural force amalgamation of the Serbian oppressors and his own Croatian people.

At the age of 16, he was asked to join the Yugoslavian Communist Party. He refused, not because he was against Communism, but because he believe the Yugoslavian Communists be wholely dominated by Serbian intersts.

Busic immigrated to the United States in December, 1969, settling in Cleveland, Ohio. Since then he has devoted himself to furthering the national independence of the Croatians by speaking and writing before every relevant group in cities of the United States and Europe.

He has oppressed the cause of the Croatians and revealed what he believed to be the oppression of his people by the Serbians. His Europe activities often involved considerable risks and he had even encounters with the Secret Police of Yugoslavia, Germany and Austria.

In 1971 he was expelled from Austria with one hour's notice when the Austrian Secret Police called him a dangerous revolutionary.

He explains this that they labeled him that only after they had invited him to corroborate with the police and he had refused. He states that he has engaged in these activities entirely on his own without financial support from any source.

He denies being a paid agitator or paid Political worker. He claims to have supported himself at all times, doing whatever work was available and financing all his own activities and travels with the help of his wife.

He had met his American wife, Julienne,

in Vienna in about 1968 or 1969 and married her in May, 1972, in Germany. His wife participated with him in many of his political activities in Europe, such as distributing leaflets in Yugoslavia and like activities.

Busic was satisfied that if he ever returned to Yugoslavia, he would be instantly arrested, jailed and probably assassinated.

Hence, he avoided returning to Yugoslavia and instead, his wife would go. He believed this to be safe for her because of her American nationality.

Busic related to me a number of instances in which Croatian activists, both in Europe and in the United States, have been subject to attacks, torture and assassination by what he believes to be secret Serbian agents.

He, himself, has always been dedicated to peaceful means oppressing his cause. Speeches, writing, distributing leaflets publicly reveals what he believes to be the true fact of the oppression of the Croatian people.

He strongly deplored all violence and has long been convinced that violence or any activity which might result in physical harm to anyone, friend or foe, would be immoral and detrimental to his cause.

Yet, for several years, he has been accutely conscious that he might become the subject of an assassination at any moment at any place in order to silence his protests.

Since at least January 1976, he has been completely convinced that he would soon be killed, that there was no way of indefinitely avoiding assassination by his political enemies who he believed would go to any lengths to silence him.

He believed that there were Serbian agents in the United States as well as in Europe and that his time was running out.

He thought that they would not bear an assassination attempt in the presence of his wife who might be a witness against them. Hence, his desire that she be with him at all times.

Yet he firmly believed that they would get him alone eventually and kill him. He estimated his own life expectancy as a year or less.

It was in this frame of mind, a highly abnormal mental state in my opinion, that he determined to perform one last meaningful heroic act for the benefit of the Croatian cause. He felt compelled to devote his remaining life to the performance of his act which would bring the injustices opposed upon his Croatian people to the attention of the entire world.

To accomplish this, he planned the sky-jacking with the sole intention of forcing the sky-jacked plane to drop leaflets over various European cities. The idea had developed slowly in his mind over a period of months.

He thinks the idea first occurred to him in January, 1976, but he is not certain of the date. He had just learned of the assassination of a friend. His tortured and mutilated body had been found in the Rhine River in Germany and he had received word from his mother in Yugoslavia that she feared that they planned to kill him, too.

Some months before planning the sky-jacking, he had been approached by persons in New York City who offered to sell him eight sticks of dynamite for $200 together with a blasting cap.

He purchased them with the vague idea that "who knows, I might need it." Possessing the dynamite and believing himself to be in imminent danger of being killed, he slowly developed the plan for the skyjacking. Paradoxically, the explosives were necessary in his thinking, to avoid any danger to the plane or occupants. He was determined that there should be no violence or even the slightest potential for violence during the skyjacking.

Hence, no weapons or explosives must be permitted on the plane, but the police and the airplane personnel must be convinced into believing that the threat of violence had a reality basis.

(Continued on next page.)

Accordingly, preparations were made to deposit a real bomb with actual explosives in the airport locker. The plan was to make it appear that the harmless pseudo-bomb which he carried on the plane was an exact duplicate of the real bomb in the locker.

He personally bought all of the materials for both the real and the false bomb, wrote the text of the leaflets, arranged for their translation from Croatian into French and English, had them printed, purchased airplane tickets and took care of each detail, including the placement of the bomb in the locker.

He insists that none of the men knew anything about what was planned and played no part in these preparations, and that his wife, Julienne, helped only in editing the leaflets, and was not informed on how they would be distributed.

The printer was also not informed. The bomb which was placed in the downtown locker near Grand Central Station was constructed by him in such a manner, he believed, that it could be safely disarmed when discovered.

He says there was no timing or other delayed action device, and that detonation was by a transistor radio battery controlled by a simple electric switch. As described by Busic, it was the type of bomb which could only be detonated by someone pushing the switch causing the bomb to explode, but also killing the person pushing the switch.

Hence, he believed it would cause the police who found the bomb at his direction to believe that the pseudo-bomb on the plane was similar and that the sky-jackers were prepared to sacrifice their own lives if necessary.

At the same time, he firmly believed that he had constructed the real bomb in such a manner that it could be safely disarmed by the police on its discovery. He persists still in this belief and he is dismayed and remorseful that this bomb resulted in the death of a policeman and the injury of others.

He wanted more than anything else to avoid violence and harm to anyone because of his conviction that any harm to anyone would tend to discredit his cause.

Particularly, he did not want to appear as a terrorist or criminal. He now expresses the opinion that the bomb must have been tampered with sometime after its removal from the locker in such a manner as to cause it to explode and kill the policeman.

He admits that he has no evidence to support this belief, but he thinks it's quite within the capacity of a Serbian secret agent to have surreptitiously altered the bomb in some way after it was in the hands of the police.

The question naturally arises whether this belief that he was in danger of an assassination and his conviction that a secret agent must have tampered with the bomb to cause it to explode are paranoid delusions and manifestations of mental illness.

It is my opinion that they are not.

In Busic's mind and life experiences, he had no reason to think other than that such danger of harm to himself was objective reality. His explanation of the bomb's explosion and the death of the policeman is, I think, a necessary effort on his part to reconcile what actually happened with his careful planning to avoid violence and harm.

Hence, I do not regard these thoughts as delusional or evidence of mental illness under these circumstances. He acknowledges that he did some studying as to how to make a bomb, reading some terrorist literature on bombs.

In response to my inquiry, he indicated that he was unaware of the hazard of dynamite which is old and deteriorated, and that it never occurred to him that the explosives sold to him might have been stale and in a dangerous and unstable condition.

The skyjacking, the placement of the bomb in the locker, and all other complicated preparations, were in my opinion the acts of a desperate man in a highly abnormal mental state, acting out of fear and determination.

Believing in the righteousness of his cause and in the imminence of his own death, he felt compelled to plan and perform what was to him to be one last heroic act to inform the entire world of the cause of the Croatian people's language and culture.

He hoped and believed that if the world were so informed, it would thwart any further oppression by the Yugoslavian government and the Serbians, which he believed controlled that government.

Taking into consideration his lifelong social and cultural indoctrination, the social and political circumstance of his childhood, his total preoccupation with the salvation of the Croatian cause, the belief in the reality threat to his own life, and his obsessive determination to perform one last act of value to his people, it seems clear to me that he lacked any mental ability to make a choice or decision to do other than what he did do.

If the definition of the crimes for which he is charged require an element of criminal intent, implying the power of free will, choice, and decision, as exercised by ordinary men, then Zvonko Busic lacked in my opinion, the capacity for such criminal intent, and he did not in fact have such intent.

He did what he did out of psychological necessity, not free choice.

Q Doctor, are you aware that the standard of criminal intent under the air piracy statute is wrongful intent?

A Yes, sir, I am.

Q And does your opinion take account of that statutory definition?

A Yes, I believe that he was unable to appreciate or understand the wrongfulness of his acts.

Q And if the statutory definition of wrongful intent should be defined as including the elements knowingly and wilfully, what effect, if any, would that have on your opinion?

A My opinion is unchanged. Knowingly and willfully to me imply free will, powers of choice and decision, and these were lacking in the defendant.

Q Doctor, do you have an opinion on the subject of Busic's relationship with the other males who accompanied him on the skyjacking?

A According to the statements and information provided me by the defendant, the other participants knew nothing of what was expected of them, and what was going to happen. They were asked to participate in this proposal blindly and unknowingly.

They were told, according to Busic, that they must follow his orders implicitly and without inquiring as to any of the details of what was going to happen, or the why's and purposes, other than it was for the purpose of helping the Croatian nationalist movement.

It is my impression that this is a common and prevalent manner of operating under these circumstances.

Q And giving your views as to Mr. Busic's mental condition, would it have been consistent with your understanding of that condition for him to have kept from the other male defendants the nature of the action in which he was asking them to participate?

A Yes, I think it was totally consistent. Not only did he fear for the security of the whole procedure and activity, but believing that his life would be terminated in the near future, he felt it best that the full responsibility for everything that happened and was going to happen be upon him, and therefore he informed no one of any details of the whole plan.

Q Doctor, you testified that the defendant has and had an abnormal mental state.

Is an abnormal mental state the same as an abnormal mental condition?

A An abnormal mental state and an abnormal mental condition are synonymous.

Q Doctor, you also testified concerning the defendant's views about the safety of the device that was placed in the locker in Grand Central.

Do you have an opinion concerning his appreciation and capacity to appreciate the potential danger posed by such a device?

A It is my opinion that from everything the defendant knew about the design and construction of the device placed in the locker, that he firmly and unequivocally believed it to be perfectly safe and would not and could not result in any harm to any individual.

MR. TIGAR: Off the record.

(Discussion off the record.)

MR. TIGAR: This concluded the sworn question and answer statement which will be submitted as an offer of proof in connection with the defendant's proposed defense based on mental condition pursuant to Federal Rule of Criminal Procedure 12.2B.

(Time noted: 9:05 a.m.)

____

DR. BERNARD L. DIAMOND

Subscribed and sworn before me

this_____day of____________, 1977.

____

Notary Public

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, EDWARD HARRISON, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That DR. BERNARD L. DIAMOND, the witness whose deposition is hereinbefore set forth, was duly sworn by me, and that such deposition is a true record of the testimony given by said witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of April, 1977.

Edward Harrison

EDWARD HARRISON

W+L

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 76-CR-602

ZVONKO BUSIC, JULIENNE :
BUSIC, PETAR MATANIC,
FRANJO PESUT, :

Defendants. :

--------------------------------x

United States Courthouse
Brooklyn, New York

April 12, 1977
10:00 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

JOSEPH BARBELLA
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
BARRY SCHULMAN, ESQ.
EDWARD KORMAN, ESQ.
Assistant U.S. Attorneys

MICHAEL TIGAR, ESQ.
-and-
PIERCE O'DONNELL, ESQ.
Attorneys for Zvonko Busic

DAVID RUDOLPH, ESQ.
-and-
MICHAEL ASEN, ESQ.
Attorneys for Defendant Julienne Busic

MARTIN ELEFANT, ESQ.
PAUL BERGMAN, ESQ.
Attorneys for Defendant Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Pesut

Also present:

BORIS MURUMA
Official Croatian Interpreter

(The following took place in the absence of the jury.)

THE CLERK: Shall I swear in the interpreter, your Honor?

THE COURT: Yes.

(Whereupon, Boris Maruna was duly sworn as the interpreter.)

THE COURT: Well, I think -- well, ladies and gentlemen, I think I ought to place on the record at least a reason for my decision yesterday afternoon.

Yesterday, this Court ruled that Zvonko Busic, pursuant to his "mental condition" defense under Federal Rule of Criminal Procedure 12.2(b), could call no expert witness in support therefore. Rule 12.2(b) provides that a defendant who intends to introduce expert testimony relating to "a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged" shall give the specified notice.

Now, Mr. Busic has repeatedly disclaimed any defense pursuant to Rule 12.2(a). See Zvonko Busic's Memorandum in Support of Defense of Mental Condition at page 14.

We noted that in light of Dr. Diamond's analysis in his letter of March 15, 1977, attached to Busic's memorandum of law, he could not, in any event, claim insanity under the standard set forth in United States v. Freeman, 357 F.2d 606 (2d Circuit 1966).

Nevertheless, Busic seeks to offer expert testimony and to have his mental condition defense evaluated under a hybrid strain of the Freeman standard. See Memorandum of Law at pages 10 and 11. This misconceives the mental condition defense. THough there is no Second Circuit decision which indicates that mere mental condition which does not comply with the Freeman standard is to be submitted to the jury under a differen rationale, we can refer to United States v. Brawner, 471 F.2d 969 (D.C. Circuit 1972), and specifically to that portion of the opinion on page 998 which states, and I quote:

"Our decision accompanies the redefinition of when a mental condition exonerates a defendant from criminal responsibility with the doctrine that expert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime -- even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration."

Mr. Busic argues that the situation described in Brawner is present here because his mental condition prevented formation of what he argues as the "specific intent" necessary to commit air piracy. He then claims that the possibility exists of conviction of a lesser included offense, to wit, the offense of interference with a flight crew, in violation of 49 U.S.C. Section 1472(j).

First, the intent required to commit air piracy is a general, not a specific intent, as would be required, for example, for first degree murder. And there are several other crimes in which specific intent is required other than to do the "actus reas" such as burglary, larceny and assault with intent to commit murder.

Now, this is not such a case. No specific mental element is required here to accomplish the actor's ultimate object in order to charge him with the proper degree of criminal conduct. The seizure of an aircraft within the specific aircraft jurisdiction by force or violence or by threat thereof requires no specific intent as distinguished from most other Federal crimes. This can be gleaned from the statute itself, as well as consideration of the nature of the crime and Congressional intent.

Second, we perceive no lesser included offense here which would fit within the framework of Brawner for the operation of the mental condition defense. The intent necessary to violate 49 U.S.C. Section 1472(i) is no different from that necessary to violate 49 U.S.C. Section 1472(j). Interference with the flight crew is a different offense, not a lesser offense included in air piracy.

Finally, references made to Rule 707 of the Federal Rules of Evidence to the testimony of experts. These rules support the conclusion that no such testimony should be permitted if such testimony is not necessary to understand the evidence or would not be helpful to the jury to determine a fact in issue. In this case, such testimony on the contrary would only confuse.

Now, the Court has made a diligent search for a proper basis upon which to permit introduction of the offered testimony, but it can find no such basis. Since the prerequisites for a mental condition defense are absent here, the psychiatric testimony bears no relation to any cognizable jury issue and cannot be pemitted or admitted.

Now, this Court would also note that it is clear that Zvonko Busic does not lack the competency to stand trial nor to assist his counsel in this defense.

There are two other comments I would like to make. In the first place,the document -- Dr. Diamond has made it clear from the -- in his letter of March 15, 1977 that he is not claiming the defendant Busic was insane or that he has any mental defect or any mental disease. These two elements are absolutely necessary to satisfy the requirements of Freeman, which is the leading case in the Circuit.

Now, if Busic pushes to still plead insanity, the Court is perfectly willing to let him do so. In that case, then the Doctor will have to say that he suffers from a mental defect or a mental disease.

Now, the letter of Dr. Diamond, however, specifically states this is not the fact. Consequently, I should have no basis on which this testimony can be admitted.

I might say that Mr. Busic argues that the Freeman test is simply not the test of insanity, but the test of the lack of responsibility. Thatmay be true. Nevertheless, the Doctor must say, according to the Freeman test, that Busic had a mental disease, or as to -- as Freeman says, mental defect.

Now, Freeman depends on Section 401 of the penal code -- rather the ALI model penal code. And I'm quoting from Freeman. It says:

"Section 4.01 provides that a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the harmfulness of his conduct or to conform his conduct to the requirements of law."

That's the test. You can call it what you will, lack of responsibility, insanity, but that's the test.

Now, Brawner, as I said before, doesn't apply. And I wanted the record to show my reasons.

All right, let's proceed.

(Continued on next page)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -x

UNITED STATES OF AMERICA

-against-

76 CR 602

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC and FRANE PESUT,

Defendants.

- -x

GOVERNMENT'S REQUEST TO CHARGE

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(Of Counsel)

4/15/77

REQUEST NUMBER 1

Counts One and Two of the indictment charge each defendant with air piracy in violation of Section 1472(i) of Title 49 of the United States Code and Section 2 of Title 18 of the United States Code. The difference between Count One and Count Two is that Count One charges that the death of Police Officer Murray resulted from the air piracy.

I shall first instruct you on the elements of the offense that are common to both Count One and Two, and then I shall instruct you as to the additional element which must be established to justify a verdict of guilty as to Count One.

The offense of air piracy consists of the following elements, each of which the prosecution must prove beyond a reasonable doubt:

First, a defendant must seize or exercise control of an aircraft;

Second, the aircraft must at that time be within the special aircraft jurisdiction of the United States. As applied to this case, "special aircraft jurisdiction" means that the aircraft must be a civil aircraft of the United States, and must be in flight. An aircraft is "in flight"

Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent. Devitt & Blackmor, Federal Jury Practice and Instructions, § 1305 (2d Ed.)

Now as I have already told you, Counts One and Two also charge a violation of 18 U.S.C. §2. Section 2, in pertinent part, provides that:

Whoever aids or abets the commission of an offense against the United States is punishable as if he did the act.

Thus, the guilt of a defendant may be established without proof that he personally did every act constituting the offense charged if he aided and abetted another in the commission of a crime and had the requisite criminal intent.

In order to find aiding or abetting, it is necessary to find beyond a reasonable doubt that a defendant wilfully associated himself in some way with the criminal venture charged and that he wilfully participated in it as he would in something he wished to bring about.

If you want to find out whether a person aided or abetted, you have to ask yourself questions like this: Did he wilfully and knowingly associate himself with air piracy?

Did he participate in it as something he wished to bring about? Did he seek by his actions to make it succeed?

If he did, then he is an aider and abettor and he is punishable the same way as a principal. Again, I emphasize that, in order to be guilty of aiding and abetting, a defendant has to know that something illegal is being done and knowingly assist someone else in accomplishing that illegal activity._/

I now come to the element that distinguishes Count One from Count Two - and that is the allegation in Count One that the death of Officer Murray resulted from the commission of the offense of air piracy. I remind you that in order to convict a defendant of Count One, the government must establish this additional element beyond a reasonable doubt.

In order to find that the death of Officer Murray resulted from the commission of the air piracy, it must be established that the bomb which exploded and allegedly caused the death of Officer Murray was planted in order to facilitate the air piracy; that the explosion of that bomb, in fact, was the cause of Officer Murray's death, and that the explosion was a foreseeable consequence of the act of planting the bomb. United States v. Guillette, 547 F.2d 743 (C.A. 2, 1976).

_/ Patterned on Judge Weinstein's instructions in United States v. King, No. 75 Cr. 973.

The defendants Julienne Busic, Fran Pesut and Petar Matanic have introduced evidence that they did not know that the bomb had been planted in order to facilitate the hijacking. I instruct you, however, that this by itself is not a defense. An "accomplice who aids and abets the commission of a felony is legally responsible as a principal for all acts of the other person which are in furtherance of the common design, or are the natural and probable consequence of acts done in the perpetration of the felony." United States v. Heinlein, 490 F.2d 725, 735 (C.A.D.C. 1973). This is so even if the aider and abettor did not know of the acts which caused the death, or, indeed, even if he expressly attempted to prevent the death. United States v. Heinlein, supra, 490 F.2d at 736; People v. Wood, 8 N.Y. 2d 48, 51-52 (1960). Now I emphasize, however, to find a defendant guilty of Count One, which involves the death of Officer Murray, you must find beyond a reasonable doubt that the bomb must have been planted to further the commission of the offense of air piracy, and that he or she aided and abetted in the commission of the offense of air piracy in accordance with the instructions I have previously given you. This is so because a defendant who aids and abets in the commission of the offense of aircraft piracy would not be responsible for a death caused by the person he is aiding and abetting, that is the principal, if the principal caused the death as a separate and distinct act to satisfy his own end rather than to facilitate the aircraft piracy.

The defendants have also introduced evidence to show that the bomb was not a time bomb, that it was not intended to go off, and that the explosion was the result of the intervening acts of negligence of Officers Murray, McTigue and Dworkin. This evidence, even if believed, does not necessarily provide a defense to Count I.

A fundamental principle of criminal law is that a person is held responsible for all consequences proximately caused by his criminal conduct. The concept of proximate cause incorporates the notion that an accused may be charged with a criminal offense even though his acts were not the immediate cause of the victim's death or injury. In many situations giving rise to criminal liability, the death or injury is not directly caused by the acts of the defendant but rather results from intervening forces or events, such as negligent medical treatment, escape attempts, or the negligent or intentional acts of a third party. Where such intervening events are foreseeable and naturally result from a perpetrator's criminal conduct, the law considers the chain of legal causation unbroken and holds the perpetrator criminally responsible for the resulting death. This principle applies even where the direct cause of death is a force set in motion by the victim himself. For example, if a person acting on a well grounded and reasonable fear of death or bodily injury induced by an accused's threats or actual assaults, dies in an attempt to extricate himself from the danger, the accused bears criminal liability for the death. See United States v. Guillette, 547 F.2d 743, 749 (C.A. 2, 1976).

So that what you must ultimately determine, in light of all the evidence, is whether the explosion of the bomb and the death allegedly caused by the explosion, was a foreseeable consequence of a defendant's criminal conduct. The government, of course, bears the burden of establishing this element beyond a reasonable doubt.

REQUEST NUMBER 2

In this case, along with the elements of the offense of Counts One and Two, as I have described them, the government must prove it is proper to try this case in the Eastern District of New York, which encompasses Brooklyn, Queens, Staten Island, Nassau and Suffolk counties. In legal terminology the government must prove that venue is proper in this district. "The law requires that criminal cases be tried within a district which bears some fair and rational relationship to the crime or crimes charged." _/ Normally this standard is satisfied if the crime charged has been committed in the district where a defendant is tried. When an offense is committed while a plane is flying 30,000 feet in the air at 500 or 600 miles an hour, the district over which the plane is flying when the actual seizure takes place will often have no fair or rational relationship to the crime charged. United States v. Busic, ___F.2d___, No. 76-1552, Slip Op. p. 1595. In such a case venue is proper, that is, a defendant may be tried in the district from which the hijacked plane took off, if prior to takeoff, the defendant had formed the clear intent to seize control of the plane once it was in the air.

_/ Charge of Judge Weinstein in United States v. King, No. 76 CR 482; United States v. Busic, ___F.2d___, No. 76-1552, Slip op. p. 1593, n.9.

Here it is not disputed that the plane which was hijacked took off from LaGuardia Airport, in Queens County, within the Eastern District of New York. The government, however, must establish, as to each defendant, that prior to the take-off he or she had the clear intent to seize control of the plane after it was in the air. Because venue is not an element of the offense, the government need not prove this fact beyond a reasonable doubt; it is enought that it show that it is more liekly than not that the defendants had such an intent. This is what we call "a preponderance of the evidence." In other words, a preponderance of the evidence on the issue of venue means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. _/

Since intent and purpose are states of mind and it is not possible to look into a man's or woman's mind to see what went on in it, the only way you have of arriving at the intent and purpose of a defendant is for you to take into consideration all of teh facts and circumstances shown by

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_/ Def. Request to Charge, No. 56

the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of a defendant was at the time in question. Thus direct proof is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant.

The defendants Julienne Busic, Fran Pesut and Petar Matanic have introduced evidence to show that they had no knowledge, prior to take off, that the plane would be hijacked and they had no intent to do so. Even if you believe this evidence, venue may, nevertheless, be proper in the Eastern District of New York if you find that (1) the defendants aided and abetted the defendant Zvonko Busic in the commission of the offense after the plane took off; and (2) that the defendant Zvonko Busic had, prior to take off, formed the clear intention to unlawfully seize control of it. This is so because one who aids and abets another person to commit a crime may be tried in the district in which that person, whom we call the principal, may be tried, even if the aider and abettor had never set foot in the district in which the principal may be tried._/

Normally, it is not appropriate for a district court judge to tell the jury how they should decide a particular element of an offense. Since venue is not an element of the offense, that restriction does not apply.

I instruct you that if you believe the testimony of Zvonko Busic, it is sufficient without more to justify trying him in the Eastern District of New York. Of course, before you may find him guilty, however, you must find that the government has established all of the elements of the offense as I have instructed you. Moreover, if you believe the evidence introduced by the government regarding the involvement of the defendants in the preparation and planning of the offense, prior to the take off of the plane, than those acts too would be corroborative of a clear intent to seize control of the plane after take off, and would justify venue in the Eastern District of New York. United States v. Busic, supra, Slip op. p. 1593.

_/ See Eley v. United States, 117 F.2d 526, 528 (C.A. 6, 1941), cited and applied in United States v. Kirkpatrick, 458 F.2d 864, 868 (C.A. 7, 1972); United States v. Gillette, 189 F.2d 449, 451, n. 4 (C.A. 2, 1951); Accord: United States v. Jackson, 482 F.2d 1167, 1179 (C.A. 10, 1973); United States v. Bozza, 356 F.2d 206, 221 (C.A. 2, 1966); Hoss v. United States, 232 F. 328, 335 (C.A. 8, 1916); Anno: Multiple Venue of Federal Criminal Offenses, 5 L.Ed., 2d 973, 975.

Now, please keep in mind that these instructions on venue apply only to Counts One and Two - which involve the airpiracy.

Count Three, as I have told you, involves a conspiracy to commit the offense of air piracy. This charge may be tried in the Eastern District of New York if you find, by a preponderance of the evidence that a defendant entered into a conspiracy to hijack the airplane and one overt act in furtherance of the conspiracy was committed in the Eastern District of New York by any defendant._/ In other words, if you find one defendant committed one overt act in the Eastern District of New York, then he and all of the defendants who conspired with him may be tried in the Eastern District of New York. Moreover, I instruct you, that if a defendant boarded the plane in the Eastern District of New York, pursuant to a conspiracy to seize control of it, then venue is proper in the Eastern District of New York as to that defendant and to any defendant who conspired with him to commit the offense. See Downing v. United States, 348 F.2d 594, 598-599 (C.A. 5, 1965) and cases cited.

_/ Def. Request to Charge No. 60.

REQUEST NUMBER 3

In this case, the defendants, ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC and FRANE PESUT, testified. There is no obligation or compulsion on a defendant to testify, but when he or she takes the stand and does testify, his or her credibility is tested by all the same rules and guides that any other witnesses are tested by. You know that, of course, a defendant is interested - vitally interested - in the outcome of a case, his or her case. That is not to say anyone who is interested in the case necessarily lies, but it is a fact you must take into consideration. A man or a woman who is interested in the outcome of a case might see things differently. You and I do it sometimes consciously and sometimes subconsciously. We see things differently when we are interested in any event. If you find that any witnesses, and that includes the defendants, lied as to a material fact, you may disregard all the testimony that that witness gave on the theory that one who intentionally lies to a material fact is not worthy of belief and you may reject all of his or her testimony, or you may say, well, we feel he or she lied as to a material fact, and we will discard, reject that particular testimony, but we will believe the rest of his or her story because it seems to fit in with other testimony, and it has the ring of truth. There is supporting testimony, corroborating testimony, so we will believe the rest. Now, this is just to underscore a wide discretion that the Jury has in assessing testimony, in weighing testimony. It is you and up to you alone to determine who lied; if anyone lied, what weight, what credence is to be given to the testimony.

> United States v. Sullivan, 329 F.2d 755, 756-757 (C.A. 2, 1964).

rec'd [illegible]
April 18, 1977
[illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

-against-

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC and FRANE PESUT,

Defendants.

- x

Judge Bartels

76 CR 602

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
JUN -1 1977
TIME A.M.
P.M.

DEFENDANT FRANE PESUT'S MEMORANDUM IN SUPPORT OF THE ADMISSIBILITY OF THE EXPERT TESTIMONY OF DR. ROBERT BUCKHOUT ON THE FACTORS WHICH MAY AFFECT THE RELIABILITY OF EYE-WITNESS IDENTIFICATIONS.

Irwin Rochman
230 Park Avenue
New York, New York 10017
(212) 685-6488

Attorney for Defendant
Frane Pesut

(175)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

-against-

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, and FRANE PESUT,

Defendants.

- -x

76 CR 602

DEFENDANT FRANE PESUT'S
MEMORANDUM IN SUPPORT OF
THE ADMISSIBILITY OF THE
EXPERT TESTIMONY OF DR.
ROBERT BUCKHOUT ON THE
FACTORS WHICH MAY AFFECT
THE RELIABILITY OF EYE-
WITNESS IDENTIFICATIONS.

INTRODUCTION

In order to aid the jury in properly evaluating the eyewitness testimony of the Government's witnesses, Mr. Gore and Mr. Bracaglia, Defendant Frane Pesut intends to introduce the testimony of Dr. Robert Buckhout. Dr. Buckhout is a psychologist, with expertise in the scientific field of perception and memory, and the social and perceptual factors which may affect the reliability of eyewitness identification. Dr. Buckhout's proferred testimony will not include his own opinion as an expert as to the reliability of the eyewitness identification of either Mr. Gore or Mr. Bracaglia. The offer of proof as to Dr. Buckhout's testimony is limited to the presentation of scientific findings of a general nature in the field of memory and perception, based on his own research and the extensive body of scientific writing in this field. Without commenting on the credibility of any particular eyewitness, he will testify as to the results of scientific research concerning:

(1) The effects of the insignificance of the event on perception and memory;

(2) The effects of the length of the period of observation on the ability of the eyewitness to remember and recall accurately what has been observed;

(3) The effects of the physical condition of the witness on his perception and memory;

(4) The effects of the time lapse between the observation and the initial recall (e.g., photo spread) on perception and memory, including testimony on the process of forgetting, specifically on the psychologists' view of memory as a process of reconstruction.

(5) The effects of the differences in various kinds of recall tests on the reliability of the eyewitness identification.

1. THE RELIABILITY OF EYEWITNESS IDENTIFICATION AS A PROPER SUBJECT FOR EXPERT TESTIMONY

Rule 702 of the Federal Rules of Evidence provides that scientific, technical or other specialized knowledge is admissible if it will, "assist the trier of fact to understand the evidence or determine a fact in issue."

Dr. Buckhout's testimony will provide the jury with a scientific basis for evaluating the reliability of the eyewitness testimony in this case. It will enable the jury to have the benefit of scientific research and findings in the field of perception and memory, with which laymen are completely unfamiliar. The proferred testimony is particularly important because such scientific findings dramatically refute certain popular assumptions which are accepted as being simply matters within the realm of "common sense."

Rule 702 of the Federal Rules of Evidence provides that an expert witness must be, "qualified as an expert by knowledge, skill, experience, training, or education...."

Dr. Buckhout has been accepted as a qualified expert in this field in numerous State and Federal courts, including this District Court (U.S. v. Jarvis, July, 1976). A copy of his *curriculum vitae* is annexed hereto.

A scientific test must have gained general acceptance in its field and the scientific principles underlying the testimony must be generally recognized as valid, before evidence of the test is admissibile. *Frye* v. *United States*, 293 F.1013 (CADC 1923). Certainly no supportable claim can be made that the principles upon which Dr. Buckhout's testimony is founded are not generally accepted in the field of perception and memory. See, *United States* v. *Addison*, 498 F.2d 741, 744 (CADC 1974), and page 6 of Dr. Buckhout's *curriculum vitae* annexed hereto.

In *United States*. v. *Brown*, 501 F.2d 146 (9th Cir. 1974) and *United States* v. *Amaral*, 488 F.2d 1148 (9th Cir. 1974), appellate courts found no abuse of discretion in the trial court's refusal to permit expert testimony on the factors affecting the reliability of eyewitness testimony. Obviously, neither case holds that permitting such testimony would have been erroneous; the matter is one within the discretion of the trial judge. The court's reasoning in each of these cases is inapplicable to the case at bar. The proferred testimony would not encroach upon or invade the province of the jury, because Dr. Buckhout will not be offering an opinion on the ultimate issue to be decided by the jury--whether the jurors are satisfied beyond a reasonable doubt that the identification testimony is accurate. According to Wigmore, the whole theory of usurping the jury's function is illogical; no one can compel the jury to accept a witness' testimony. 2 Wigmore, Evidence §673 at 795 (3rd Ed. 1940). In any event, Rule 702 of the new Federal Rules of Evidence, permits an expert to testify in the form of an opinion or inference, "which embraces an ultimate issue to be decided by the trier of fact."

The second reason cited by the court in Brown and Amaral, the inadequacy of the offer of proof, is also not present here. If the court wishes us to supplement our offer, Dr. Buckhout will be available to testify, outside the presence of the jury, in more detail as to what his testimony will be.

The third reason cited in these two cases, that the consumption of time involved would outweigh the probative value of the testimony, is not applicable in this case. It is estimated that Dr. Buckhout's direct testimony would take no longer than one hour. Although the court has broad discretion under Rule 403 of the Federal Rules of Evidence, "the probative value of the evidence proferred [is] so great, it should not [be] excluded in the absence of a significant showing of unfair prejudice." United States v. Dwyer, 539 F.2d 924, 928 (2d Cir. 1976).

The eyewitness identification of Gore and Bracaglia, is a crucial part of the case against defendant Pesut. There is, "no question that identification testimony is notably fallible, and the result of it can be, and sometimes has been the greatest single injustice that can arise out of our system of criminal law, [citations omitted] namely the conviction of the wrong man through a mistake in identification." United States v. Evans, 484 F.2d 1178,1187 (2d Cir. 1973).

Cross-examination alone is not the answer to the problem. It may be a powerful tool in exposing the witness who is lying, but it is far less effective in dealing with the honest but possibly mistaken witness, and exposing and helping the jury understand the factors leading the witness to his testimony. "The expert is not concerned with truth and veracity, but with the ability of the eyewitness to perceive and remember accurately." (emphasis supplied) C. R. Wilson, Psychological Opinions on the Accuracy of Expert Testimony, 14 The Judges Journal 1975 (4), (72-74).

"[J]udges should be open to the possibility that expert testimony may indeed be helpful to jurors in cases where the dangers of identification are not readily apparent to the layperson. Sobel, Eyewitness Identification, 1972, 1976 Sup p. 87.

CONCLUSION

The testimony of Dr. Buckhout should be admitted.

Dated: New York, New York
April 15, 1977.

Respectfully submitted,

IRWIN ROCHMAN
230 Park Avenue
New York, New York 10017
(212) 685-6488

Attorney for Defendant
Frane Pesut

O

November 1976 - Legal Resume

[illegible]
O [illegible] 15, 1977
[illegible]

MEMORANDUM REGARDING DR. ROBERT BUCKHOUT'S QUALIFICATIONS AS AN EXPERT IN SOCIAL AND PERCEPTUAL FACTORS IN EYEWITNESS IDENTIFICATION

Robert Buckhout, Ph.D.
Center for Responsive Psychology
Brooklyn College, C.U.N.Y.
Brooklyn, New York 11210
(212) 780-5960, 780-5635

1. Education: B. S. in Psychology, Queens College, New York, 1957.
   M. S. in Psychology, North Carolina State College, 1959.
   Ph.D. in Psychology, Ohio State University, 1963.

2. Employment: Associate Professor of Psychology, Brooklyn College, City University of New York, September 1972 to present. Director, Center for Responsive Psychology. Editor, SOCIAL ACTION AND THE LAW newsletter.

3. Area of Expertise: Social and experimental Psychology - Perception, memory, stress, and social influence.

4. Testimony: Social and perceptual factors in eyewitness identification

5. Relevant Experience:

   (A) November 1958 - September 1962: Officer in U.S. Air Force: Assigned to Aerospace Medical Laboratory, Wright-Paterson Air Force Base, Dayton, Ohio. Did research and development work on flight simulators, plus research on stress, reconnaissance, and the perception of flight crew members.

   (B) September 1962 - September 1963: Research Associate in the Laboratory of Aviation Psychology, Ohio State University, Columbus, Ohio.

   (C) September 1963 - September 1968: Assistant Professor of Psychology, Washington University, St. Louis, Missouri. Director of Experimental Psychology Laboratory.

   (D) September 1967 - September 1968: Consultant to Army Aviation Medical Laboratory. Psychiological and stress factors affecting helicopter pilots.

   (E) September 1968 - September 1970: Visiting Professor of Psychology at the University of California, Santa Cruz and Berkeley campuses.

   (F) September 1970 - September 1972: Associate Professor of Psychology, California State University, Hayward, California

6. Testimony regarding social and perceptual factors in eyewitness identification:

    1. People v. Chavez (Rape-robbery), Superior Court, Alameda County, on July 15, 1970 - Judge Axelrod.
    2. People v. Richardson and Williams (Armed robbery), Superior Court, Alameda County, on October 29, 1971 - Judge Barber.
    3. People v. Angela Y. Davis (Murder), Superior Court, Santa Clara County, on May 23, 1972 - Judge Arnason.
    4. People v. Pratt (Murder), Superior Court, Los Angeles, on June 27, 1972.
    5. People v. Castle (Armed robbery), Superior Court, Contra Costa County, on April 1, 1974 - Judge Sam Hall.
    6. People v. Kincy, et al (Assault with deadly weapon), Superior Court, San Bernadino County, on April 3, 8, 1974 - Judge Cunningham.
    7. Dr. Buckhout testified in the United States District Court for the Central District of California on August 30, 1972 in Case No. 10171-HP-CD, United States v. Richard Coleman Smith (Armed robbery), in the courtroom of the Honorable Harry Pregerson.
    8. His appointment was authorized by the Honorable Robert J. Kelleher, in the case United States v. Antonio James Palacios, No. 11609-RJK-CD.
    9. New York v. Crippen (Robbery), Supreme Court, Bronx County, New York, on November 1, 1974 - Judge Silberman. Dr. Buckhout testified in a Wade suppression hearing on suggestivity in a lineup.
    10. New Jersey v. Bolton (Lewd conduct), State Court, Union County, Elizabeth, New Jersey, on January 14, 1975 - Judge McGrath. Public Defender - R. Lehrik.
    11. U S. v. Reginald Jackson (Armed robbery), District Court, District of Columbia, on January 20, 1975 - Judge Goodrich. Public Defender - Robert Boraks. (Wade Hearing)
    12. New Hampshire v. William McKenney (Murder), Superior Court, Stafford, SS, Dover, New Hampshire, on March 2, 1975. Defense Attorney - Douglas Gray, Portsmouth, New Hampshire.
    13. People v. Richard Boldon (Attempted murder), No. 3180-74, Queens County, Supreme Court, New York - Judge Dubin. Defense Attorney - Edgar Walker (212 -- TR3-7900), on April 8, 1975.

14. Maryland v. Blackwell (Armed robbery), CR-15019, Montgomery County, Circuit Court, Rockville, Maryland, on April 14, 1975 - Judge Cahoon. (Wade Hearing)

15. Florida v. Richard Campbell (Armed robbery), 74-2777, Circuit Court of Palm Beach County, on April 24, 1975. (Wade Hearing and trial)

16. People v. Ernest Montgomery, R. Woods and L Whitehead (Attempted murder), Bronx County Supreme Court, New York - Judge Zimmerman. Defense Attorney - Jay Hirschauer, Legal Aid Society.

17. People v. Eugene Duncan (Murder), No. 71-112, County Court, Tomkins County, Ithaca, New York, on June 19, 1975. Defense Attorney - Richard Mulvey.

18. State v. Chaisson (Fraud, grand larceny), Douglas County Court, Omaha, Nebraska, on June 5, 1975. Public Defender - William Campbell (Co-counsel - Bob Morans, San Francisco).

19. People v. Milton Rucker (Armed robbery), New York County Supreme Court, on September 19, 1975 - Judge Sutton.

20. People v. Kenneth Wilson (Armed robbery), Queens County Supreme Court, New York, on October 6, 1975 - Judge Smith.

21. State v. Leo McGill and John Hall (Murder), Ingham County District Court, Lansing, Michigan on October 8, 1975 - Judge Brown.

22. People v. Moulterie (Rape), Kings County Supreme Court, New York.

23. People v. Edward Stevens (Rape), Orange County Court, Goshen, New York, on March 15, 1976.

24. Commonwealth v. Breedan (Murder), Fairfax County Court, Vienna, Virginia, on July 26, 1976. (Wade Hearing)

25. U. S. v. Soliah (Robbery), U. S. District Court, Eastern District of California, Sacramento, California, on April 1976.

26. U. S. V. Roszoryk (Extortion), U. S. District Court, Western Michigan, Grand Rapids, Michigan, on June 1, 1976.

27. U. S. v. Jarvis (Robbery), U. S. District Court, Eastern District, Brooklyn, New York, on July 19, 1976.

7. Professional Affiliations:

Member, American Psychological Association and Eastern Psychological Association, Division of Experimental Psychology
Member, Human Factors Society
Member, Psychonomic Society
Member, Psychophsiological Research Society
Member, American Psychology-Law Society
Honors: Sigma Xi - honorary society for research

8. Relevant Publications: From over 30 papers and 4 books, the following:

   1. Hood, P., Krumm, R. L., O'Sullivan, F. J., Buckhout, R., et al. Conference on integrated aircrew training. WADD-TR-60-320, Wright-Paterson AFB, Ohio, July 1960.

   2. Buckhout, R. Three chapters in Flanagan, R. (Ed.), (Unclassified title), Spacecrew training study evaluation. ASD-TR-61-127, (Secret Report), Wright-Paterson AFB, Ohio, May 1961.

   3. Buckhout, R. A working bibliography on the effects of motion on human performance. MRL-TDR-62-77, Aerospace Medical Laboratory, Wright-Paterson AFB, Ohio, July 1962.

   4. Buckhout, R. Considerations in the design of automatic proficiency scoring devices for flight simulators. AMRL Memorandum P-40, Aerospace Medical Laboratory, Wright-Paterson AFB, Ohio, June 1963.

   5. Buckhout, R., Naylor, J. C., & Briggs, G. E. The effects of modified task feedback during training on the performance of a simulated attitude control task after 30 days. AMRL-TDR-63-125, Aerospace Medical Laboratory, Wright-Paterson AFB, Ohio, December 1963.

   6. Naylor, J. C., Briggs, G. E., & Buckhout, R. Long-term skill transfer and feedback conditions during training and rehearsal. AMRL-TDR-136, Aerospace Medical Laboratory, Wright-Paterson AFB, Ohio, December 1963.

   7. Buckhout, R., et al. The effect of variations in motion fidelity during training on simulated low-altitude flight. AMRL-63-108, Wright-Paterson AFB, Ohio, December 1963.

   8 Buckhout, R. Effects of whole body vibrations on human performance. Human Factors, 1964, 6 (2), 157-163.

   9. Buckhout, R. Need for social approval and attitude change. Journal of Psychology. 1965, 60, 123-128.

   10. Buckhout, R. Need for social approval and dyadic verbal behavior. Psychological Reports, 1965, 16, 1013-1016.

   11. Buckhout, R. The blind fingers. Perceptual and Motor Skills, 1965, 20, 191-194.

   12. Buckhout, R. Dermooptical perception, Science, 1966.

   13. Buckhout, R. Through a bag, darkly, American Psychologist, 1968, 23 (11), 832-833.

14. Barton, N., & Buckhout, R. Effects of objective threat and ego threat on repressers and sensitizers in the estimation of shock intensity. Journal of Experimental Research in Personality, 1969, 3 (3), 197-205.

15. Buckhout, R., McNeil, M , & Sutton, D. EDR and HR patterns of abstract and concrete information processors. Psychophysiology, 1969, 5 (5), 587.

16. Zacher, A., Greenberg, M. S., & Buckhout, R. Reactions of normal and depressed subjects to injustice in social exchange situations. Journal of Experimental Research in Personality, 1970, 4, 228-232.

17. Buckhout, R., et al. Determinants of eyewitness performance on a lineup, Bulletin of the Psychonomic Society, 1974, 4 (3), 191-192.

18. Buckhout, R., et al. Eyewitness identification: Accuracy of individuals v. composite description of a crime. Report No. CR-10, April 1974. Also, Bulletin of Psychonomic Society, in press.

19. Buckhout, R. Guilt by Fabrication: Psychology of the eyewitness. In Ziegler, P. (Ed.). Psychology from the inside, New York: Harper & Row, 1974.

20. Buckhout, R., et al. Eyewitness identification: Effects of suggestion and bias in identification from photographs. Bulletin of the Psychonomic Society, 1975, 6 (1), 71-74.

21. Slomovits, M., Buckhout, R., et al. Toward a test for the eyewitness: Application of signal detection theory to eyewitness identification. Report No. CR-14, Center for Responsive Psychology, October 1976.

22. Buckhout, R. Eyewitness testimony. Scientific American 1974, 231, (6), 23-31. Also, Recent Progress in Perception. 1976.

23. REPRINT: Eyewitness testimony. Jurimetrics, American Bar Association, Spring 1975.

24. Buckhout, R. 1800 Witnesses can be wrong: Eyewitness identifications by witnesses to a televised crime. Social Action and the Law, 1975, 2 (3), 7.

25. Fanselow, M., & Buckhout, R. Non-verbal cueing as a source of biasing information in eyewitness identification testing. Report No. CR-26, Center for Responsive Psychology, August 1976.

26. Rupp, A., Warmbrand, A., Karash, A., & Buckhout, R. Making the blind see: Effects of group discussion on eyewitness reports. Report No. CR-19, Center for Responsive Psychology, August 1976.

27. Buckhout, R., Katz, D., & Greenwald, M. Eyewitness identification in black and white. Report No. CR-21, Center for Responsive Psychology, August 1976.

Witness will testify to theory and research held by experimental and social psychologists on the basis of doctoral level laboratory research which challenges commonly held beliefs about human perception among laymen.

Such research is conducted under controlled conditions in which the objective truth of a perception is known by the researchers - to provide a test of eyewitness's perception.

Such research involves specialized apparatus beyond the training and experience of laymen.

Witness has conducted specific basic laboratory research, taken specialized courses on human physiology, sensory and perceptual processes, statistics and experimental techniques, vital to the interpretation of data which underly evidence and theories described in testimony.

Witness has personally conducted specific research on eyewitness identification in simulated crimes, statistically analyzing such data and reporting same in professional journals and books.

Witness has had extensive experience in assisting in actual criminal investigations gathering evidence, taking photographs which approximate the human observer's perception of the scene of the crime, measuring the amount of light at the scene - comparing such evidence to scientific evidence of the human observer's ability to perceive.

Witness has had experience applying said skills and experience to the human observer's ability to perceive in complex military - combat - situations which approximate those conditions (especially stress) present in the commission of crimes.

Witness has done research, study and had direct experience in testing for eyewitness identification using photospreads and corporeal lineups. Witness is prepared to give the court his opinion on the fairness, competence and possible sources of suggestion and bias in photospreads and/or corporeal lineups, comparing such tests to accepted principles of sound testing. Such experience and background is clearly beyond the training and experience of laymen.

The history of psychological reaearch on the ability of the eyewitness dates back to 1895 and continues to result in hundreds of scientific articles published in regular professional journals through the present year. Such scientific publications are not generally available to the layman.

Applied scientific research on the problems of eyewitness identification is currently supported by grants to the State University of New York (Buffalo) from the Law Enforcement Assistance Administration of the U.S. Justice Department - symbolic of the importance attached to this problem.

The results of this research are not available to the laymen - or to any but involved researchers in this field.

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

DGT:ERK:rb
F. #763251

April 19, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic, et al.
76 CR 602

Dear Judge Bartels:

I write to express our objection to the so-called eyewitness identification "expert" which the defendant Fran Pesut has indicated he intends to call. We observe at the outset that every reported decision on the issue of the admissibility of such testimony has either excluded it, or affirmed a trial judge's refusal to admit such testimony in general, and this expert in particular. See United States v. Brown, 540 F.2d 1048, 1053-1054 (C.A. 10, 1976); United States v. Brown, 501 F.2d 146, 150 (C.A. 9, 1974), reversed on other grounds, sub nom, United States v. Nobles, 422 U.S. 225 (1975); United States v. Amaral, 488 F.2d 1148 (C.A. 9, 1973); United States v. Collins, 395 F. Supp. 629, 635-636 (M.D.Pa., 1975). Indeed, it is hardly established in the Second Circuit that the failure even to give a cautionary instruction on evaluating eyewitness testimony is error. See United States v. Evans, 484 F.2d 1178, 1187-1188 (C.A.2, 1973).

We, of course, do not object in principle to a cautionary instruction on eyewitness identification, and submit herewith a counter request to charge which more than amply highlights the areas that the expert would testify on. We believe, however, that the proferred testimony is not only superfluous, but also unnecessary because with the assistance of cross-examination, the jury is capable of understanding the arguments which the defendant seeks to emphasize unfairly with the "aura of special reliability and trustworthiness" that attaches to expert testimony. United States v. Amaral, 488 F.2d 1148, 1152 (C.A. 9, 1973).

It hardly requires a well paid expert to tell the jury that tests have established that the length of the period of observation, the significance of the event observed, the physical condition of the witness, and the time lapse between observation and initial result, are factors which may influence the reliability of the identification (Def. Memo. of Law, p. 2). Accordingly, it is not surprising that such testimony has generally been excluded and that the defendant cites no reported decision, nor have we found any, to support his offer of proof.

While it may be his testimony was admitted in other trials in which, of course, the prosecution has no right of appeal, those cases may very well be distinguishable from this case. Here, of course, we are not dealing with eyewitnesses who were victims to a crime or witnessed a crime. They were not subject to the emotional trauma which may impair such identifications or to the social pressures which such persons may be under to make an identification. Indeed, they came forward, and singled Mr. Pesut out of the group of hijackers whose pictures appeared in the newspaper. So that much of traditional testimony in cases of this kind would not be relevant here.

Moreover, while I understand that this expert may testify that a so-called "desire for fame" may impel some people to come forward to claim that they witnessed an event take place, this type of testimony comes perilously close to be wholly improper - indeed, it is the equivalent of calling an expert to say that some defendants may lie out of a desire for an acquittal.

The expert here is totally unequipped to testify to what motivated these eyewitnesses or to suggest the identification is erroneous. Whether they are fabricating their testimony out of a "desire for fame", which they certainly haven't achieved, like the issue of whether a defendant or a witness is lying, is basically for the jury to determine, aided by cross-examination, unhampered and unconfused by a paid expert.

In short, the instruction which we enclose, and which closely parallels the defendant Pesut's request #1, along with cross-examination to highlight the factors which common sense suggests bear on the issue, adequately protects the defendant and may even give him more than he is entitled to have.

Finally, these considerations aside, we were not given anywhere near sufficient notice of the defendant's intent to call this witness, to familiarize ourselves with all his writings and to generally prepare for his cross-examination. My earlier allusion to his possible testimony is based solely on reading a transcript of a trial in which he testified.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

Edward R. Korman

By: EDWARD R. KORMAN
Chief Assistant
United States Attorney

Enc.

cc: Irwin Rochman, Esq.

COUNTER-REQUEST TO CHARGE ON THE ISSUE OF EYEWITNESS IDENTIFICATION

One of the facts which the government has sought to establish in order to show that the defendant Fran Pesut was intimately involved in the planning of the air piracy and the planting of the bomb was that he was present at Grant Central Station in the early morning of September 8, 1976. As you may recall, two eyewitnesses were called to testify and said they saw Mr. Pesut there on that occasion.

Ladies and Gentlemen, "[i]dentification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the [person] *** and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the [individual he has identified]?

Whether the witness had an adequate opportunity to observe the *** [person identified] will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

* * * * *

(2) Are you satisfied that the [subsequent] identification made by the witness *** was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

* * * * *

(4) Finally, you must consider the credibility of each identification witness in the same way as any other

witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony."

* * * * *

If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you should not consider such testimony at all in determining whether the prosecution has proven defendant Pesut's guilt beyond a reasonable doubt as to Counts One, Two and Three.

The quoted portions of the charge are taken verbatim from the appendix to the opinion of the Court of Appeals from the District of Columbia Circuit, United States v. Telfaire, 469 F.2d 552, 558-559 (1972). Since the defendant's guilt or innocence does not depend on the accuracy of the identification, and it is only one additional piece of evidence linking him to the offense, we have modified the opening and closing paragraph of the Telfaire instruction. Moreover, since the witnesses were not traditional witnesses to a criminal act, we have slightly modified the text of the charge.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 76-CR-602

ZVONKO BUSIC, JULIENNE :
BUSIC, PETAR MATANIC,
FRANJO PESUT, :

Defendants. :

------------------------------x

United States Courthouse
Brooklyn, New York

April 20, 1977
10:00 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

ILENE GINSBERG
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
BARRY SCHULMAN, ESQ.
EDWARD KORMAN, ESQ.

MICHAEL TIGAR, ESQ.
-and-
PIERCE O'DONNELL, ESQ.
Attorneys for Zvonko Busic

DAVID RUDOLPH, ESQ.
-and-
MICHAEL ASEN, ESQ.
Attorneys for Defendant Julienne Busic

MARTIN ELEFANT, ESQ.
-and-
PAUL BERGMAN, ESQ.
Attorneys for Defendant Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Pesut

Also present:

BORIS MURUMA,
Official Croatian Interpreter

doctor's testimony, by saying it is simply -- offers to the jury conclusions that any layman would know. It disregards or misses the points made in the memorandum and in the doctor's testimony.

What is being offered here to assist the trier of the facts can go with Rule 702, as to which laymen have no knowledge. We once said that layment could tell whether a person was crazy or not to us a crude term. We deal here with extensive research and findings in an area.

Our position is in order for jurors to have a question like your Honor's and miss as a former prosecutor experienced, that this is the area --

THE COURT: I have listened to the arguments of both of you. I have your argument and your brief which I had yesterday, and I looked up the cases myself before I got Mr. Korman's brief and I have given it a certain amount of consideration.

Of course, gentlemen, I believe there is a question of balance in the last analysis here -- so I am willing to make the decision right now as follows:

On April 18, 1977 during the trial in this case and after the Government had rested, the defendant, Frane Pesut filed a memorandum in support of his intention to offer the testimony of Dr. Robert Buckhout as an expert in the "scientific field of perception and memory" to aid the jury in evaluating the testimony of Mr. Gore and Mr. Bracaglia.

The Government moved to exclude this testimony and filed papers and briefs in support of its motion. Now, there may be cases, and there are cases where Dr. Buckhout's testimony could be of great help to the trier of the facts. In my opinion this is not one of those cases and after consideration of the cases and the argument presented by both sides the Court has concluded that the Government's motion should be granted for the following reasons:

First, there was no confusion or uncertainty as to the testimony of the two Government witnesses in identifying Frane Pesut. These witnesses were not under any stress when they observed the person in Grand Central Station in the first instance nor when they identified him in the second instance, the photographic display nor on the third instance, that is the lineup, and under the circumstances I don't believe the tests were so erroneous as to make the identification also erroneous.

Now, this defendant was practically alone at a very late or very early hour as you wish to refer to it in Grand Centeral Station. At that time it was not necessary to pick this defendant out of any group. He stood out by himself, and both witnesses had not only the opportunity to see this defendant but to talk to him for a brief moment.

Now, this is not the kind of case where such expert testimony is going to be helpful to the trier of the facts because of the manner in which the identification was triggered and the complete neutrality of both the witnesses.

Secondly, Pesut had and did avail himself of the opportunity to effectively cross-examine both witnesses concerning their length of period of observation, the time lapse between the initial recall or recollection and the photographic spread, and the time lapse between the initial recall and the lineup. Cross-examination also brought out any environmental conditions or undue stress or inconsistencies which might make the account of both eyewitnesses unreliable.

Furthermore, this is a matter within the broad discretion of the trial court and under these particular circumstances I believe that on balance the probative effect of any expert witness' testimony would be far outweighed by the greater influence such testimony would have on the jury which would present a substantial risk of undue prejudice and of misleading the jury by the expert's aura of special reliability and trustworthiness. Federal Rule of Evidence 403; Notes of Advisory Committee to Federal Rule of Evidence 702. See also United States v. Brown, 501 F. 2d 146 (9th Cir. 1974), reversed on other grounds sub nom United States v. Nobles, 422 U.S. 225 (1975); United States v. Amaral, 488 F. 2nd 1148 (9th Cir. 1973); United States v. Collins, 395 F. Supp. 629 (M.D. Pa. 1975).

Third, at this late date in the midst of trial the United States has no opportunity to either research the doctor's qualifications for purposes of cross-examination or to present an expert with contrary views. The Court notes that the matters to be testified to by the two identification witnesses was known to defense counsel at or before the pre-trial suppression hearings and there was no suggestion prior to April 18 that Pesut would seek to offer the testimony, of such a so-called identification expert witness.

MR. ROCHMAN: I am not re-arguing.

THE COURT: Listen, I have had that trouble. I have to proceed.

MR. ROCHMAN: I have to except your ruling in one sentence. I except to your ruling again generally and specifically on the ground you stated under

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
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AND REFER TO
INITIALS AND NUMBER

DGT:ERK:rb
F. #763251

April 22, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic, et al.
76 CR 602

Dear Judge Bartels:

This letter is written to detail several objections to the supplemental requests to charge submitted by the defendant Matanic.

Supplemental Request to Charge No. 1

We object to Supplemental Request to Charge No. 1 which assumes erroneously that the crime of being an "accessory after the fact" is a lesser included offense of air piracy. This assumption is plainly erroneous. As Professor Wright has observed (Wright, Federal Practice & Procedure, § 515, p. 372):

> "One offense is necessarily included in another if it is impossible to commit the greater without also having committed the lesser. Thus murder includes such lesser offenses as second-degree murder, manslaughter, and negligent homicide. Robbery necessarily includes larceny, and assault with intent to rob. Rape necessarily includes assault with intent to rape. Assault with a dangerous weapon includes simple assault. Theft of property in excess of $100 includes the lesser wrong of theft of property of value not exceeding $100. In each of these instances some of the elements of the greater crime charged are in themselves enough to constitute the lesser crime."

Quite obviously it is possible to commit the offense of air piracy without being an accessory after the fact. Indeed, the two offenses are completely separate. "The very definition of the crime [of being an accessory after the fact] *** requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal." United States v. Barlow, 470 F.2d 1245, 1253 (C.A.D.C. 1972).

Moreover, the lesser included offense charge is not proper "if some element is required for the lesser offense but not the greater" (Wright, supra, § 515, p. 374). Here, the so-called lesser included offense of being an "accessory after the fact" requires a showing that the defendant assisted the offender in avoiding apprehension. This element, of course, is not required for the offense of air piracy.

Although there are other reasons precluding the lesser included offense charge here, these should suffice as a basis for our objection.

Supplemental Request to Charge No. 2

The defendant here seeks an instruction that any false exculpatory statement made by him may not be considered if the jury finds that they were made as false excuses for the separate offense of being an accessory after the fact. This request is equally without support.

The only case cited, United States v. Freeman, 498 F.2d 569 (C.A. 2, 1974), was one in which the record established that the defendant was clearly guilty of being an accessory after the fact (498 F.2d at 579). The issue was whether false exculpatory statements made after his arrest were of "probative value" in determining whether he was a member of a conspiracy to commit the substantive offense. In holding they were not, Judge Friendly observed (498 F.2d at 575, n. 9):

> "Since Freeman was obviously aware that he was sheltering at least one person (Rudner) who was guilty of importing cocaine, the evidence of various false statements made by him after his arrest and the consequent inference of consciousness of guilt, see United States v. Smolin, 182 F.2d 782, 785-786 (2 Cir. 1950), are not probative of Freeman's participation in the conspiracy."

Moreover, Judge Friendly went on to note that post-conspiracy acts of concealment could be considered if there was other evidence in the case to indicate that the defendant was a member of the conspiracy to commit the substantive offense (498 F.2d 576).

The facts in the present case are so obviously distinguishable from Freeman that any further discussion would be superfluous.

Supplemental Request to Charge No. 3

We have already made our position plain on the "death resulting" clause of Count I and we rely on authorities cited on Page 5 of our request to charge.

Supplemental Request to Charge No. 4

This request regarding the consideration to be given by the jury to a confession is perhaps the most frivolous of all.

First, the issue of the admissibility of the confession is for the district court and not the jury. And the standard for determining voluntariness is not proof beyond a reasonable doubt, but a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972).

Second, "[n]either § 3501 nor the Constitution mandates that a jury must disregard a confession if it believes the confession was coerced, despite a judge's determination that it was voluntary." United States v. Barry, 518 F.2d 342, 346, and n. 5 (C.A. 2, 1976).

Finally, the only instruction which must be given is that the jury "give such weight to the confession as the jury feels it deserves under all the circumstances" 18 U.S.C. § 3510(a); United States v. Barry, 518 F.2d 342 (C.A. 2, 1975).

For these reasons, each of the supplemental instructions requested by the defendant Matanic should be denied.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

Edward R Korman

By: EDWARD R. KORMAN
Chief Assistant
United States Attorney

cc: Paul B. Bergman, Esq.
Martin Elefant, Esq.

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
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ERK:om

April 25, 1977

Honorable John R. Bartels
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Busic, et al.
Docket No. 76 CR 602

Dear Judge Bartels:

This letter is written in response to the memorandum of the defendant Busic on the meaning of the death resulting clause of 49 U.S.C. 1472(i). Our request to charge on this issue is based on the language of United States v. Guillette, 547 F.2d 743 (C.A. 2, 1976), which construed an identical clause in the Civil Rights Law. The defendant Busic, however, argues that while United States v. Guillette, supra is "relevant to some issues raised in this case [it] is not dispositive".

According to the defendant, Section 1472(i), "in the words of floor manager Representative Kuykendall during the floor debates in the House of Representatives, [is] a 'felony murder' provision". Since Congress has chosen to "pattern air piracy resulting in death on the existing felony murder statutes, decisions construing such statutes become crucial". We are then cited to a series of cases which allegedly support the proposition that the government must prove beyond a reasonable doubt "that the resulting death was not the result of fortuity, intervening acts of a third party or some other form of supervening cause" (Memo p.2).

This argument is based on a misreading of the case law and the legislative history of the air piracy statutes. The cases cited by the defendant Busic involve statutes, such as Section 189 of the Penal Law of California, making "all murder committed in the perpetration or attempt to perpetrate***" a felony (People v. Washington, 44 Cal. Rptr. 442, 445.) Such statutes have been construed to apply to murders whether accidental or inadvertant committed by felons in the perpetration of the felony (44 CAl. Rptr. 445), but not to killings committed solely by third persons, i.e. when a victim of an offense kills one of the defendants.

As the Supreme Court of California recently observed: "Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning--if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances. This court has reiterated numerous times that 'The purpose of the felony-murder rule is to deter felons from killing negligently or accidently by holding them strictly responsible for killings they commit.' (People v. Washington (1965) 62 Cal. 2d 777, 781, 44 Cal. Rptr. 442, 445, 402 P.2d 130, 133.) The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof." People v. Burton, 99 Cal. Rptr. 1, 9 (1971).

Here, of course, death did result from an act committed by the defendant in the perpetration of the felony, i.e. the planting of the bomb, and the state cases cited by the defendant are of no help to him.

Of course, the foregoing discussion has assumed that this Court should disregard federal case law, construing statutes identical to Section 1472(i), and look to differently worded statutes. Such a course is clearly unwarranted. Moreover, the debate in the Congressional Record cited by the defendant plainly supports our position.

We note at the outset that the debate focused not on the death resulting language in Section 1472(i) 1/ which the defendants are charged with violating, but on the meaning of the clause in the mandatory death penalty provisions of Section 1473(c)(7) which provides:

> If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that--
>
> (A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or
>
> (B) the death of another person resulted from the commission or attempted commission of the offense, and--
>
> ***

1/ Section 1472(i)(1) provides in pertinent part:

> Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished --
>
> (A) by imprisonment for not less than 20 years; or
>
> (B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

Representative Wiggins thought that this language was too harsh because it permitted a mandatory death penalty where the death may have been wholly unintended, and introduced an amendment which would have removed the "death results" clause from Section 1473 - not Section 1472(i), and substituted the phrase, death was intended by the defendant and did result. (120 Cong. Rec. [Part 5] 6542):

MR. WIGGINS. My two amendments deal with the problems of unintended deaths for which a defendant may be put to death himself. Several fact situations have been discussed with Members of the House previously. This legislation is overboard in that it requires the imposition of the death penalty, even though the death of the victim was not caused by any direct act of the defendant himself, and even though that consequence was unintended by him.

> Now, let me set the stage for this amendment. For the death penalty to be imposed, the defendant first must be guilty of the substantive act of hijacking.
>
> Second, a death must occur as a result of hijacking. There must be an absence of mitigating circumstances and there must be finding of aggravating circumstances. If the above are found to occur, the death penalty is mandatory.
>
> These fact situations are called into order by my amendments:

First, let us suppose that a police officer in the course of apprehending the defendant shoots and accidentally kills a passenger in the plane. Under this legislation, I represent to the gentlemen present that a defendant could be put to death. I suggest that such a consequence is not probably the intent of this body, nor should it be our intent.

Another fact situation has been described. During emergency evacuation procedures following a skyjacking, a woman may fall and may die as a result of her emergency evacuation attempt of the airplane. The defendant may be subject to the death penalty under those circumstances.I represent to the Members that such a consequence is not what is intended.

Another fact situation is that of a skyjacker who may induce a heart attack in a passenger.

The defendant is subject to being put to death on a mandatory basis by reason of such an unintended result. My amendment only adds a few words. It says that the death must be intended by the defendant as well as result of the commission of the criminal act. The defendant must intend the consequences for which he is put to death. That clearly is what we are talking about in this legislation and a bill which puts a man to death by reason of an unintentional and consequential death of another is not, I hope, what this House is willing to accept.

The following colloquy then ensued

MR. KUYKENDALL. Mr. Chairman, will the gentleman yield?

MR. WIGGINS. Mr. Chairman, I yield to the gentleman from Tennessee.

MR. KUYKENDALL. Mr. Chairman, if I could have the committee's attention, is it the intention of the gentleman in the well to wipe out in this case the felony murder as a first degree murder?

MR. WIGGINS. Mr. Chairman, by analogy only that would be correct.

MR. KUYKENDALL. In other words, normally a felony murder is a first degree murder, correct?

MR. WIGGINS. Yes.

MR. KUYKENDALL. And in this case, declaration that the felony murder is not in the same category as the premeditated murder?

MR. WIGGINS. That is true, by analogy. Mr. Chairman, I ask support of my worthwhile amendments.

MR. STAGGERS. Mr. Chairman, I rise to oppose the amendment. Under section (E) [Section 1473(c)(6)(E), as the Members will read in the bill, it says:

> He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause or would create a grave risk of causing death to another person.

MR. DENNIS. Mr. Chairman, I rise in support of the amendments. Mr. Chairman, I just want to point out to the committee that in this amendment we are dealing, to begin with, with a situation where the death penalty is mandatory--no discretion. All the gentleman from California is saying is that it should not be mandatory unless the man intended to kill somebody. That is the whole proposition, and I just suggest that a Member cannot be against this kind of an amendment if he has good sense, or humanity, or any of the things most Members have got.

THE CHAIRMAN. The question is on the amendments offered by the gentleman from California (Mr. Wiggins.)

The amendments were rejected.

What is obvious from this colloquy, when read in context, is that Congress plainly understood that, *without* the mitigating factors set forth in Section 1473(c)(6)(E), the kind of deaths which Representative Wiggins described would plainly be covered by the death resulting language and require a mandatory death penalty. Since the mitigating factor in paragraph (6)(E) would reduce a mandatory death penalty to life imprisonment, it is apparent that Congress clearly understood that, one could be guilty of violating Section 1472(i) and be subject to a mandatory life sentence, even if the death could *not* have been reasonably foreseen. Indeed, our request to charge on this issue probably gives the defendant more than he is entitled.

Second, it is also apparent that Representative Kuykendall used the words "felony murder" in a loose non-technical way, "by analogy" to quote Rep. Wiggins. What Representative Kuykendall was saying was that the amendment introduced by Rep. Wiggins would reduce the felony murder from murder-in-the first degree punishable by death, to a lesser offense. The colloquy lends no support to the defendant's position.

In short, Congressional debates cited by the defendant Busic plainly supports our position and the holding in *United States* v. *Guillette*.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

By: Edward R. Korman

EDWARD R. KORMAN
Chief Assistant
United States Attorney

cc: All Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- :

ZVONKO BUSIC, JULIENNE BUSIC, PETAR MATANIC, FRANE PESUT, : 76-CR-602

:

Defendants. :

-------------------------------x

United States Courthouse
Brooklyn, New York

May 3, 1977
9:30 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

SHELDON SILVERMAN
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PETER SCHLAM, ESQ.
BARRY SCHULMAN, ESQ.
EDWARD KORMAN, ESQ.
Assistant U.S. Attorneys

MICHAEL TIGAR, ESQ.
-and-
PIERCE O'DONNELL, ESQ.
Attorneys for Zvonko Busic

DAVID RUDOLF, ESQ.
-and-
MICHAEL ASCH, ESQ.
Attorneys for Defendant Julienne Busic

MARTIN BELFANT, ESQ.
PAUL BERGMAN, ESQ.
Attorneys for Defendant Matanic

IRWIN ROCHMAN, ESQ.
Attorney for Defendant Pesut

Also present:

BORIS [illegible]
Official Croatian Interpreter

7

refreshed her recollection from that letter.

THE COURT: Isn't that what you would call super duper technical --

MR. RUDOLPH: I am merely making my record.

THE COURT: All right. Overruled.

Does everyone have a copy of the charge?

Now, you can have one.

MR. HOCHMAN: Can we have an extra?

THE COURT: You can get it later.

MR. SCHLAM: I would like an extra copy.

THE COURT: Where is my young man? Do you have an extra copy?

THE LAW CLERK: We have two extra copies which we intend to keep for our records.

MR. SCHLAM: I will give it back tO you after the charge.

THE COURT: Yes. He will give it back to you after the charge. And we will have it xeroxed.

Are the doors locked?

If we have any children here, I think I will have to ask them to leave now because we may be restrained here for a couple of hours.

Very well, let's bring in the jury.

(Whereupon, the jury entered the jurybox.)

THE COURT: Well, ladies and gentlemen, I will begin my charge now. And if it's going to take two hours, I will stop at the end of one hour to give you a five minute rest, if that is agreeable.

Very well.

Now, ladies and gentlemen:

You have listened most attentatively to the testimony and to the summations. The testimony presented the facts through witnesses and exhibits. The summations presented the arguments of the attorneys, pro and con, concerning those facts.

The time has come for you and me to perform our respective functions in the trial of this case. You have been very patient. You have heard the voices of the attorneys and the Court and now your voice will be heard.

At the beginning, I wish to extend to you my deep appreciation for your attentiveness and your alertness during the course of this trial, particularly to express my gratitude for the sacrifice each and every one of you has made in neglecting your business and personal affairs to see that the ends of justice might be accomplished. You have been most tolerant of the unavoidable delays, and we have all noticed how interested you are in your task.

Every criminal prosecution is important to the Government of the United States, and it is equally important to the defendants on trial. Each is entitled to equal justice at your hands.

From my experience, justice is best dispensed in a calm, patient, careful and deliberate manner, and I sincerely request you to keep that attitude throughout your deliberations when you go into the juryroom. Now, of course, you should always respect the viewpoints of your fellow jurors. You should talk to each other with consideration and intelligence and decide the issues in this case on the merits and on the merits alone. However, each juror should reach his own conclusion, no juror should surrender or compromise his own belief or conviction as to the innocence or guilt of any defendant.

The evidence consists of the testimony of the witnesses, the exhibits admitted into the record, and the facts stipulated by counsel. The quality of evidence is not necessarily determined by the number of witnesses testifying for one side or the other. You must not consider any evidence which the Court has instructed you to disregard. Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidnece in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. You may consider their demeanor. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of your experience.

In determining the facts, you should not be influenced by any rulings the Court may have made during the trial. Those rulings dealt with matters of law and not questions of fact. The Court's ruling on objections made by any of the attorneys and any questions which the Court posed to any witness are not to be considered by you as indicating either the guilt or innocence of the defendants. The same is true with respect to any inflection of the Court's voice relative to any such matters, or in connection with any comments or statements the Court may have made to any of the attorneys. If our of zeal for his cause an attorney does something which is not in keeping with the rules of evidence or procedure, it

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is the duty of the Court to admonish such attorney. You are, however, to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

(Continued on next page.)

PENGAD CO., BAYONNE, N.J. 07002 - FORM 740

You may wonder why the Court asked the witnesses certain questions from time to time. The reason was that some of the testimony raised questions in the Court's mind and the Court felt that those questions might have been also raised in the minds of the jury. For the sake of clarity only, for these questions asked, and they must not be deemed by you as any indication of any opinion that the Court might have in this case. The Court expresses no opinion as to the guilt or innocence of the defendants. The determination of such guilt or innocence is a matter that rests exclusively with you.

You have heard the evidence and the arguments of counsel and it now becomes my duty to give you the law governing this case. It is your duty to accept the law as it is given to you by the Court and to determine the facts of the case for yourselves. The proper application of the law of the case to the facts of the case, as you find them, determines your verdict.

Now, I wish to make it very plain to you that the sole responsibility and the sole power in determining the facts are with you, and anything that I may say, or seem to say, is indicating any view or opinion as to the facts is to be ignored by you.

There are some general principles of law which are of importance in every criminal case, and I wish, first, to make some statements which apply to criminal cases in general; after which I shall endeavor to make clear to you what this particular case involves.

It is an established principle that an indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt against any of these defendants.

It is also a principle well recognized in law that every person who is charged with the commission of a crime is presumed to be innocent and he is not required to prove that he is innocent, and the verdict rests on the Government to prove to your satisfaction beyond a reasonable doubt every element of the crime and that the party is guilty as charged. This presumption of innocence remains with the defendant all through the case until, if ever, it is overborne by proof which satisfies you beyond any reasonable doubt that the presumption of innocence no longer remains with him.

The machinery of trial calls for the exercise of varying functions by counsel, by the witnesses who testify, by the Court that presides, and by the jury. You, as the jury, exercise the fact finding function.

You have been told, you are the sole judges of the facts. That is to say, it is you who must consider the evidence, weigh the evidence, and draw inferences from the evidence, and only from the evidence.

You must distinguish between the mere arguments of counsel which have been made before you and the evidence upon which those arguments rest. The repetition of an argument, however often, and however loudly or dramatically it is made, does not constitute evidence and you must carefully analyze the assertions which have been made to you by counsel for the defendants and counsel for the Government and ascertain what basis those assertions have in the evidence.

This brings us directly to the charges in the indictment itself.

The indictment, which, as I have previously told you, is not evidence in this case, charges the defendants with three offenses. I shall read that indictment to you.

(Continued on next page.)

Count one reads as follows:

"On or about the 10th and 11th days of September, 1976, within the Eastern District of New York and elsewhere, the defendants Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic, attempted to commit and did commit air piracy as defined in 49 United States Code, Section 1472(i)(2), in that the defendants, Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic, by threat of force and violence and with wrongful intent did seize and exercise control of an aircraft within the Special Aircraft Jurisdiction of the United States, to wit: a Boeing 727 known as Trans World Airlines Flight 355 bound from LaGuardia Airport, Queens, New York and enroute to O'Hare Airport, Chicago, Illinois, the commission of which offense resulted in the death of New York City Police Officer Brian Murray."

In violation of Title 49, United States Code, Section 1471(i); Title 18, United States Code, Section 2.

The last section refers to aiding abetting a crime.

Count two.

"On or about the 10th and 11th days of September, 1976, within the Eastern District of New York and elsewhere, the defendants Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic, did commit air piracy as defined in 49 United States Code, Section 1472(i)(2), in the defendant, Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic, by threat or force and violence and with wrongful intent did seize and exercise control of an aircraft within the Special Aircraft Jurisdiction of the United States, to wit; a Boeing 727 known as Trans World Airlines Flight 355 bound for LaGuardia Airport, Queens, New York and enroute to O'Hare Airport, Chicago, Illinois. (Title 49, United States Code Section 1742(i), Title 18, United States Code, Section 2.)

"Count three.

"On or about and between the 6th day of September, 1976, and the 11th day of September, 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendant Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 41, Section 1742(i), United States Code, by conspiring to commit air piracy as defined in 49 United States Code, Section 1472(i)(2) by threat of force and violence and with wrongful intent by seizing and exercising control of an aircraft within the Special Aircraft Jurisdiction of the United States."

In violation of Title 18, United States Code, Section 371.

Now, in furtherance of said unlawful conspirac the defendants Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic committed the following overt acts:

"On or about the 10th day of September, 1976, within the Eastern District of New York, the defendants Zvonko Busic, Julienne Busic, Petar Matanic, Frane Pesut and Mark Vlasic boarded a Boeing 727 known as Trans World Airlines Flight 355 at LaGuardia Airport, Queens, New York.

"On or about the 10th day of September, 1976, on board Trans World Airlines Flight 355 shortly after said flight left LaGuardia Airport, Queens, New York, the defendant Zvonko Busic handed a letter to Flight Steward Thomas VanDorn which stated:"

And I quote:

"One. This airplane is hijacked.

"Two. We are in possession of five gelignite bombs, four of which are set in cast iron pans, giving then the same kind of force as a giant granada.

"Three. In addition we have left the same type of bomb in a locker across from the Commodore Hotel on 42nd Street. To find the locker take the subway entrance by the Bowery Savings Bank. After passing through the token booth there are three windows belonging to the bank. To the left of these windows are the cockers. The number of the locker is 5713.

"Four. Further instructions are contained in a letter inside the locker. The bomb can only be activated by pressing the switch to which it is attached; but caution is suggested.

"Five. The appropriate authority should be notified from the plane immediately.

"Sixth; This plane will ultimately be heading in the direction of London, England."

The third overt act.

"On or about the 10th day of September, 1976, on board Trans World Airlines Flight 355, shortly after said flight left LaGuardia Airport, Queens, New York, the defendants Frane Pesut and Mark Vlasic exhibited metal devices to the passengers and crew of Trans World Airlines Flight 355 and indicated said metal devices were bombs.

"Four. A bomb was placed in the subway station locker in the vicinity of 42nd Street and Lexington Avenue.

"Five. On or about the 6th day of September, 1976. a Trans World Airlines ticket was purchased at LaGuardia Airport, Queens, New York in the name of S. Radic."

Now, that constitutes the indictment.

(Continued on next page.)

The case against the defendant Mark Vlasic has been severed. It is no longer of concern to you, and you should not speculate as to the reason for the severance, and it should not control or influence your verdict with reference to the remaining defendant You must base your verdict as to each of these remaining defendants so beyond the evidence against each of them.

As you have heard, there are three counts in the indictment.

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to each defendant on trial.

A separate crime or offense is charged against each of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately regardless of the evidence against other defendants. The fact that you may find all or some of the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against any of the defendants.

We now come to thequestion of venue which you have heard argued by counsel for the Government and by counsel for these defendants.

The law requires that a criminal defense be tried within a district which is some fair and ratio relationship to the crime or crimes charged. In legal terminology this is called "venue," or "place where" That's all venue means. Nothing else.

The Government must prove that venue is proper in this district with respect to all three counts:

(1) Air Piracy, (2) Air Piracy from which a death resulted, which, for purposes of venue is the same as simple air piracy, and (3) conspiracy. This district is the Eastern District of New York, which covers Brooklyn, Queens, Staten Island and Long Island.

An offense can be prosecuted in the district where it was begun, even though not completed in that district, and after completion in one district an offense can be continued in one or more districts.

Venue is not an element of the offense, and the Government must establish the particular venue of an offense charged only by a preponderance of the evidence and not by proof beyond a reasonable doubt. Proof by a preponderance of the evidence is a lesser standard of proof than proof beyond a reasonable doubt. However, failure by the Government to prove venue by a preponderance of the evidence will require a verdict of not guilty on the particular count in question which will be final as to that defendant or defendants as the case may be.

Well, what is meant by "preponderance of the evidence"? The phrase, "preponderance of the evidence," -- and I quote it -- means such credible evidence which outweighs the opposing evidence to such an extent that it appeals to you as more nearly representing what took place than that represented by the opposing evidence.

Now, that may be highly metaphysical to you. But if you can visualize the scale and some evidence outweighing the other evidence, I think you might get some idea of what we mean by preponderance of evidence.

(Continued on next page)

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In other words, it is that evidence which on balance convinces or persuades you to believe that th probability of the truth savors that issue -- in this case, venue. If on balance such evidence does not convince you, then in this case venue has not been established. As I said before, proof by a preponderance of the evidence requires a lesser standard of proof than proof beyond a reasonable doubt. You shou remember that the law, however, does not impose upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Let us now turn to the particular offenses involved here. With respect to counts one and two, charging simple air piracy and air piracy from which a death resulted, the jury may find venue in the Eastern District of New York if it concludes that the offense of air piracy, and I quote, "began" here. When does the commission of an offense "begin"? When does it "begin"? The offense "began" in the Eastern District of New York as to a given defendant, if you find that this defendant had the unequivocal intention to hijack Flight 355 before the airplane left the Eastern District of New York -- you have two things -- and that he or she committed one or more acts within this District before the airplane left this District, which were unambiguously corroborative of such intention. In connection with determining such intention from the acts committed in the Eastern District of New York, you may consider such connected or related acts which occurred outside the Eastern District of New York prior to the take-off of the plane on September 10th, 1976.

Even if you believe that one of more of the defendants did commit such acts within this District, he or she can be tried here on the air piracy count, if you find that he or she aided and abatted another defendant in the commission of air piracy, who actually did permit acts in this District which unambiguously corroborated his or her unequivocal intention to hijack the airplane.

In considering whether or not the Government has proven venue or the air piracy count in the Eastern District of New York by a preponderance of the evidence, you may wish to consider the following testimony:

One, the testimony of Zvonko Busic that he had decided to hijack a plane approximately one month prior to boarding Flight 355 at LaGuardia;

that he purchased two of the tickets used by the alleged hijackers at LaGuardia a couple of days before the alleged hijacking; that he carried on to the aircraft at LaGuardia the iron pots, wires, clay, switches, batteries and tapes from which the false bombs were made; that he carried the already typewritten hijack note in a sealed envelope on to the plane at LaGuardia;

Two, the testimony of all the defendants boarded the flight at LaGuardia Airport with tickets in fictitious names and that all of the defendants, except Julienne Busic, carried political pamphlets onto the plane at LaGuardia.

You may consider (three) the testimony that Mrs. Busic said to Maureen Collins explosives were carried on to the plane in Mrs. Busic's bags; and four, the testimony of Dale Hochstetler, a passenger the plane, about his encounter with Mark Vlasic before the plane took off.

Now, as to the Hochstetler testimony you may also wish to consider the testimony of another passenger, John Gray, who stated thatafter the plane had taken off and about ten minutes into the flight, Hochstetler left to tell him of a person in the rear of the plane with bombs, and also the testimony of Flight Attendant Lasio Gerves that Hochstetler discussed a suspicious man in the rear of the plane with her about eight or ten minutes after take-off.

I think the plane, as I recall that testimony was outside the Eastern District of New York eight or ten minutes after take off.

Now, as far as count three, the conspiracy count is concerned you may find venue for conspiracy if you are satisfied by the preponderance of the evidence that any overt act and furtherance of the alleged conspiracy was committed in the Eastern District of New York. One of the overt acts alleged in the indictment as having been committed within the Eastern District of New York, was the purchase of TWA Airline tickets at LaGuardia Airport.

Now, let me explain what is meant by an "overt act". An "overt act" is any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. Now, the overt act need not be criminal in nature, if considered separately and apart from the conspiracy. Indeed, it may be as innocent as the act of a man walking across the street or driving an automobile or using a telephone. It must, however, be an act which furthers and tends towards the accomplishment of the plan or scheme, and it must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

Let us now turn to the offenses which were charged in the indictment.

Count one of the indictment refers to aircraft piracy that allegedly resulted in death, count two refers simply to aircraft piracy, and count three refers to conspiracy to commit aircraft piracy.

The statute allegedly violated Section 1472(i) of Title 49 of the United States Code. Subsection (2) of this section reads as follows -- that gives you the definition -- and I quote:

"The term aircraft piracy mean any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the Special Aircraft Jurisdiction of the United States."

Subdivision (1) of the same section defines two separate offenses of air piracy:

One where death of another person does not result from the aircraft piracy, and, two, aircraft piracy where death of another person "results" from the commission of the aircraft piracy.

I will first, therefore, enumerate the elements of the offense of air piracy as stated in count two, the one where it does not refer to a death resulting from aircraft piracy.

Now, what are these elements:

One, seizure or exercise of control of an aircraft within the Special Aircraft Jurisdiction, which I shall later define to you; and

two, such seizure was by force or violence or threat of force or violence, or by any other form of intimidation; and

three, wrongful intent to commit aircraft piracy.

The elements of the offense in count two, which I have just enumerated, must be proven by the Government by evidence which satisfies you beyond a reasonable doubt.

Now, let us go back to count one, which refers to the death which resulted from the air piracy. The elements of the offense, as described in count one, which charges air piracy from which a death resulted, consists of the three elements I have already mentioned to you with respect to count two, that is:

One, seizure or exercise of control of an aircraft within the Special Aircraft Jurisdiction of the United States;

two, such seizure was by force or violence or threat or force or violence, or by any other intimidation, and

three, wrongful intent to commit aircraft piracy.

You see, that is the same as those elements that I already enumerated in count two, but to this list one additional element must be proven under count one, namely, that a death resulted from the commission of the offense.

The elements of the offense in count two as well as count one must be proven by the Government by evidence which satisfies you beyond a reasonable doubt.

As I have heretofore stated, the aircraft at the time must be within the Special Aircraft Jurisdiction. Now, what does this mean? The definition is set forth in Section 1301(34) of Title 49 of the United States Code. This section provides, among other things that an aircraft is in Special Aircraft Jurisdiction of the United States while it is in flight. This does not mean that the plane must be in the air. The section provides that the plane is in flight, although it is not air-borne, from the moment when all external doors of the plane are closed following emburkation, until the moment when such door of the plane is opened for disembarkation. Thus, an aircraft can be in flight under Special Aircraft Jurisdiction, although the aircraft has not yet left the ground, if all external doors of the aircraft are closed.

Let me read to you the statutory definition of this Special Aircraft Jurisdiction. I will read as follows from the statute:

The term Special Aircraft Jurisdiction of the United States includes: (a) Civil aircraft of the United States -- then there is some exercising which you are not interested in -- while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard."

I have set forth now the elements of the three offenses described in the indictment. The defendants have pled "Not guilty," to the charges claimed in the indictment. This plea puts in issue each of the essential elements of the offenses as described in these instructions, and it imposes on the Government the burden of establishing each of these elements by proof beyond a reasonable doubt.

(Continued on next page.)

Charge of the Court

I believe that the Contentions of the Government and of the defendants in this case have been made imminently clear to you the jury. I will, therefore, not marshal the evidence in this case, because I believe it is unnecessary, since I have concluded that your recollection, based upon your attentiveness of the evidence, and the bearing and demeanor of the witnesses, will not only be just as good as mine, and probably better.

In all events, it is your recollection and not my recollection of the testimony and exhibits that will control. I think, however, it might be helpful if I recite in the order of their appearances the witnesses who took the stand for the United States and the witnesses who took the stand for each of the defendants. This enumeration may or may not help you. I will first start with the list of witnesses for the United States in its case in chief. They are:

Richard Carey, the Captain of TWA Flight 355;

Dale Hochstettler, a passenger on the plane;

Howard Luker, an F.B.I. agent;

Terrence McTigue, an officer of the New York City Police Bomb Squad;

Dr. Dominic Di Maio, Chief Medical Examiner of the City of New York;

Charles Gore, an employee of O'Henry's Film Works;

George Bracaglia, another employee of O'Henry's Film Works;

Ronald Lallier, an F.B.I. agent;

James Downey, another F.B.I. agent;

Dwight Molzer, another F.B.I. agent;

Kenneth Scott, another F.B.I. agent;

In rebuttal the Government offered the following witnesses:

Thomas Davidheiser, an F.B.I. agent;

Paul Marun, another F.B.I. agent;

John Derdak, another F.B.I. agent;

Gordon Strand, another F.B.I. agent;

Vincent Rafanello, a taxicab driver;

Noreen Collins, a passenger on the plane;

Henry Dworkin, an officer of the New York City Police Bomb Squad.

To give you a list of the witnesses for the defendant, Zvonko Busic.

John Beatty, an officer in the New York City Police Emergency Service Division;

William Sims, an employee of the Federal Aviation Administration at the Cleveland Air Route Traffic Control Center;

Frank McLoughlin, Deputy Police Dommissioner for Public Relations of the New York City Police Department;

Zvonko Busic;

Eugene Connolly, an F.B.I. agent;

Zdravaka Logarusic, Zvonko Busic's sister;

John Gray, a passenger on the plane;

Basia Reeves, a Flight Attendant on the plane;

Dennis Canfield, an expert in explosives;

Father Leon Galic, a Roman Catholic priest.

Here is a list of witnesses for the defendant Julienne Busic:

Esther Evert, an acquaintance of Julienne Busic;

Maria Boyer, another acquaintance of Julienne Busic;

Steven Sunshine, an employee of SCS Business and TEchnical Institute;

Walter Rush, a passenger on the plane;

Geanne Thelwell, another passenger on the plane;

Julianna Music;

Lois Bond, an employee of Local 328 Health Center."

List of the witnesses for the defendant Petar Matanic.

Thomas Rakosi, a waiter at the Top of the Park Restaurant;

Phillip Simmons, an acquaintance of Petar Matanic;

Wayne Blackett, another acquaintance of Petar Matanic;

[illegible] Vinovic, another acquaintance of Petar Matanic;

Thomas Sanaryi, another acquaintance of Petar Matanic;

Jenny Sinaric, another acquaintance of Petar Matanic;

Father Soldo, a Roman Catholic Priest;

Wanda Raljevic, an acquaintance and girlfriend of Petar Matanic;

Petar Matanic.

List of witnesses for the defendant Frano Pesut:

Frano Pesut;

Joakim Perrinic, owner of a machine shop in the

Bronx;

Professor William Derbyshire, an expert on Slavic languages;

Dean Acrivides, an employee of Roger's Clothes

Frank Pistilli, an employee of Roger's Clothes

Ladies and gentlemen, it will be your recollection of the evidence that will count in this case and you must understand that the Court, as I said before, does not express, and has not expressed directly or indirectly, subtly or otherwise, by inclination or gesture, any opinion concerning any of the facts tha are involved in this case. If the attorneys or eith of them, have misstated the testimony, disregard suc misstatement. Again, I advise you that it will be your recollection of the testimony that will control in your deliberations, not my recollection and not the attorney's in reaching your conclusion. Of cou you must call upon your common sense.

Well, knowledge and intent is necessary to complete or to find the defendants guilty of any of these charges. The crimes charged in counts 1 and 2 of the indictment require wrongful intent. Now, what is "wrongful intent"? Well, in this case "wrongful intent" means an intent knowingly and willfully to commit the crimes charged. The defendant acts knowingly, if his acts are voluntary, and not the result of a mistake or the result of an accident or any other innocent reason. A defendant acts willfully if he voluntarily and intentionally performs acts which he knows are in violation of the law.

Now, this proof or the proof rather of this element of knowledge and wrongful intent may rest, as it frequently does, on evidence of facts and circumstances from which it clearly appears as the only reasonable and logical inference that a defendant intended to commit the specific offenses charged.

It is obviously impossible to ascertain or prove directly what a man knew or intended. You cannot look into a person's mind and see what his intentions were or what he knew, but a careful and intelligent consideration of the facts and the circumstances shown by the evidence in any given case as to a person's actions and statements, enables us to infer with a reasonable degree of certainty and accuracy what his intentions were in doing or not doing certain things, and also the state of his knowledge.

In determining knowledge and wrongful intent, you may consider a defendant's intelligence or sophistication or lack of intelligence and sophisticatio knowledge and intent is quite different from negligence. Mere negligence is not sufficient to establish the requisite wrongful intent or knowledge. Nor is mere suspicion that something is wrong or improper equivalent to knowledge or intent. On the other hand, knowledge and wrongful intent, may be inferred by the acts of the party and is a question of fact to be determined from all the circumstances, and the jury may scrutinize the particular defendant's entire conduct at the time the offenses alleged were committed.

Now, no person can disclaim knowledge or wrongful intent merely by closing his eyes intentionally to facts which would otherwise have been obvious to a reasonable person. The circumstantial evidence is sufficient to support a charge of knowledge and intent to commit these specific offenses must be sufficiently persuasive, however, as to exclude the inference of innocence under the circumstances.

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THE COURT: (continued) Now, you must not confuse intent, ladies and gentlemen, with motive. Motive is what prompts a person to act or fail to act. Wrongful intent and knowledge refers only to the state of mind with which the act is done or omitted.

You must find that a defendant had the intent to knowingly commit the particular offense charged and you must find this with respect to each defendant individually and with respect to each count, if you find that particular defendant guilty, by proof which satisfies you beyond a reasonable doubt.

The fact that a defendant might be guilty of an offense in one count does not mean that he is guilty of the offenses in the other charges.

Well, you have heard some argument here about causation. Just a word upon causation. This refers to Count 1. That count which charges that a death resulted from the commission of the air piracy. As you will recall, Count 1 of the indictment charges that the death of another person, that is, Officer Brian Murray, resulted from the commission of the offense, which charge must be proven by the Government beyond a reasonable doubt.

This requires consideration of the meaning of the phrase, "results from the commission of the offense," as used in the indictment and the statute. I will read this quite slowly because it requires attention.

In the context of the statute and the indictment, the phrase, "results from the commission of the offense" means, "caused by acts taken in furtherance of or in facilitation of the commission of the offense," which in turn means acts which are the proximate cause of the death.

Now, the death of another person need not be intended, need not be intended if in actuality it resulted from the acts taken in furtherance of or in facilitation of the commission of the aircraft piracy, and was foreseeable by a reasonable man under the circumstances.

The proximate cause of a death is that cause which in natural and continuous sequence, unbroken by an effective intervening cause, unbroken by an effective intervening cause produces a death and without which the result would not have occurred. It is the cause that necessarily sets in operation the factors which ultimately cause the death.

An act or an offense may be the proximate cause of death, even though that act was not the direct cause of the death. There may be more than one proximate cause of a death. The acts of two or more persons may work consecutively as the efficient cause of a death, and in such a case each of the participating acts is regarded in law as a proximate cause, and in principle applies even when the immediate and direct cause of death is a force set in motion by the victim himself.

The defendants have introduced evidence to show that the bomb placed in the Grand Central locker was not a time bomb, that it was not intended to go off and through the testimony of Dennis Canfield a forensic expert in explosives, they contend that explosion was a result of the intervening acts of negligence of Officers Murray, McTigue, and Dworkin.

Even if you find that the evidence of Officers McTigue, Dworkin, or Brian Murray or some other person, if you find from the evidence that Officers McTigue, Dworkin, or Brian Murray or some other person had been negligent in attempting to disarm this bomb, such negligence is not sufficient to constitute a defense, if you find that the death resulted from the commission of the offense and this is a question of causation.

The negligence of the victim, Brian Murray, or some other person which contributed to the victim's death does not break the chain of causation, unless such negligence in comparison with the original acts in furtherance of the air piracy looms so large that the original acts are superseded and cannot be regarded as a substantial factor in the final result of death.

In other words, if the act of victim, Brian Murray or of any other third person or persons is a completely new and independent act, breaking the causal connection between the original illegal acts and the death, such act would itself alone be the proximate cause of the death.

Now, it will be for you to decide, under the circumstances, whether the causal connection between the commission of the offense of air piracy and this death was broken and superseded by the acts of the victim or by the acts of others. The burden of proof beyond a reasonable doubt on this issue of causation is of course on the Government. In this case, there is testimony that Officer Brian Murray's death was caused by the explosion of a bomb at

Rodman's Neck, which was originally placed, according to the Government's contention, in a Grand Central Station locker by Zvonko Busic.

Now, you are to decide whether there is any proximate causal connection between the commission of air piracy offense and the death of Officer Brian Murray. You cannot find any defendant guilty, and this is important ladies and gentlemen, you cannot find any defendant guilty of the first count in the indictment charging air piracy resulting in death unless you find, beyond a reasonable doubt, that the defendant committed first the offense of air piracy or aided and abetted the commission of the offense of air piracy, and in addition:

One, that that particular defendant intentionally and knowingly participated, participated directly or indirectly in the placement, the physical placement of the live bomb in Grand Central Station locker, in furtherance of or in facilitation of the hijacking.

Or, two, that the particular defendant knew of the existence of the live bomb in the locker prior to boarding the plane, which he or she knew would be hijacked, and also knew that the live bomb would be used to further the hijacking.

Or, finally, three, that before the actual hijacking of the plane, he or she joined in a common design or arrangement or plan of hijacking the plane, in furtherance of which he or she could reasonably foresee from all the circumstances under which the plan, arrangement, or design was formulated, that a live bomb would be utilized somewhere on the ground, to facilitate or insure the success of the hijacking.

I think we may take a five-minute recess, ladies and gentlemen, and we will resume.

(The following occurred in the absence of the jury)

THE COURT: All right.

MR. ROCHMAN: Your Honor, something that's coming up, would you like -- in one of the charges that is coming up, you haven't read it yet; would you hear it before or after?

THE COURT: Afterwards. Everything afterwards.

MR. ROCHMAN: Okay.

THE COURT: Everything afterwards.

(recess taken)

THE COURT: All right, bring everybody in, please.

All right. Is everybody here? Lock it up.

THE CLERK: I'll bring in the jury and lock it up.

THE COURT: All right.

(jury present)

THE COURT: Very well, ladies and gentlemen, as you know, in both Counts 1 and 2, the defendants are charged also -- I mean the Government is charging the defendants with aiding and abetting the commission of the crimes set forth in the indictment, Counts 1 and 2.

Now, all the defendants in this case are charged not only with the principal offense of aircraft piracy in Counts 1 and 2; but they are also charged with aiding and abetting the commission of these offenses, by the defendant or defendants who committed the principal offenses.

What, therefore, is aiding and abetting? Section 2 of Title 18 of the United States Code referred to in Counts 1 and 2 of the indictment places in the category of a principal offender anyone who aids, or abets an offender. This section reads as follows, and I will quote:

"A.. Whoever commits an offense against

"the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"B., Whoever will fully cause an act to be done, which if directly performed by him or another would be an offense against the United States is punishable as a principal."

This section appears to be self-explanatory. Thus, anyone who does not commit the offense himself but who aids or abets an offender or causes an act to be done, which if directly performed by him would be an offense against the United States, is a principal.

Thus, anyone who shares in the criminal intent of the principal, to knowingly commit an act, which the law forbids and he or she has wilfully associated with the venture in a way that by his or her action he or she will fully participate or assist in the bringing about of the ultimate result is under this section in the same position as a principal.

Mere presence, however, at the scene of the crime, or mere knowledge that the crime is being committed is not sufficient to convict a defendant. The burden is upon the Government to prove beyond a reasonable doubt that, one, first there was a principal offense committed by a defendant or defendants, and two, a particular defendant wilfully aided and assisted in its commission and failure of the Government to make such proof is fatal to the prosecution and entitles the defendants to a verdict of acquital on this charge of aiding and abetting.

Referring to the principal offenses of air piracy set forth in Counts 1 and 2 of the indictment, it is for you to decide whether two or more of these defendants, including Mark Vlasic, associated together for the purpose of committing the offense charged. When two or more persons knowingly associate themselves together to carry out a common plan or arrangement, with the intent either to accomplish some lawful purpose by some unlawful means, there arises from the very act of knowingly associating themselves together with such intent a kind of partnership in which each member becomes the agent of every other member.

So, where the evidence in the case shows such a common plan or arrangement, evidence as to an act knowingly done or a statement knowingly made by one such person while, and I will emphasize this,

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while the common plan or arrangement is continuing and in furtherance of some object or purpose thereof, is admissible against all. In order to establish proof that such a common plan or arrangement existed the evidence must show that the parties to the plan or arrangement in some way or manner or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish some intended object or purpose of the plan or arrangement.

In order to establish proof that a defendant or other person was a party to or a member of such a common plan or arrangement, the evidence must show that the plan was knowingly formed and that the defendant or other person who is claimed to have been a member knowingly participated in the plan or arrangement, with intent to advance or further some intended object or purpose of the plan or arrangement.

In determining whether or not a defendant or any other person was a party to or a member of such a common plan or arrangement, the jury is not to consider what others may have siad or done. That is to say, the membership of a defendant or any other person in such a common plan or arrangement must be established by evidence as to his own conduct and what he himself knowingly said or did. If and when it appears from the evidence in the case that such a common plan or arrangement did exist and that a defendant was one of the members of the plan or arrangement, then the acts and statements by any person likewise found to be a member at the time may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of that defendant, provided such acts and statements were knowingly done and made during the continuance of a common plan or arrangement and in furtherance of some intended object or purpose of the plan or arrangement.

Otherwise, any admission or incriminatory statement made or act done by one person outside of the court may not be considered as evidence against any person who is not present and saw the act done or heard the statement made. A statement or an act is knowingly made or done if made or done voluntarily and intentionally and not because of a mistake or an accident or any other innocent reason.

We proceed now to the explanation of what is a conspiracy. You recall there is a charge of conspiracy in the third count of the indictment. It is charged in the indictment which I have read t you that the defendants knowingly and they wilfull conspired together to commit an offense of air piracy in violation of 18 U.S.C., Section 371. Section 371 of Title 18 of the United States Code provides, in part, that, and I quote:

"If two or more persons conspire to commit any offense against the United States, and one or of such persons do any act to effect the object c the conspiracy."

Each is guilty of an offense against the United States. Four essential elements are requ to be proven in order to establish the offense c conspiracy charged in the indictment.

First, that the conspiracy described in indictment was wilfully formed and was existing at or about the time alleged in the indictment.

Second, that the accused wilfully became member of the conspiracy and had the specific to commit the offense of air piracy.

Third, that one of the conspirators the knowingly committed at least one overt act, at the time and place alleged.

And fourth, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged. If the jury should find beyond a reasonable doubt, from the evidence in this case that existence of the conspiracy charged in the indictment has been proved beyond a reasonable doubt and that during the existence of the conspiracy an overt act was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charge is complete, and it is complete as to every person found by the jury to have been wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators or who of the conspirators did the overt act.

As stated before, the burden is also upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon the defendant in a criminal case the burden or the duty of calling any witnesses or producing any evidence.

The indictment charges a conspiracy among the defendants. Now, a person cannot conspire with himself, and therefore, you cannot find any of the defendants guilty unless you find, beyond a reasonable doubt, that he participated in the conspiracy charged in the indictment with at least one other person.

To be more specific, a conspiracy is a combination of two or more persons by concerted action to accomplish unlawful purpose or to accomplish some lawful purpose by some unlawful means. So a conspiracy is a kind of partnership in criminal purposes, in which each member becomes the agent of the other member. The gist of the offense is a combination or an agreement to disobey or to disregard the law.

Now, mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and discussed common aims and interests, other than the objects of the conspiracy, does not necessarily establish proof of the existence of a conspiracy.

Furthermore, a person who has no knowledge of the conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. The agreement is usually, if not always, an implied agreement.

That is, a mere common understanding among the parties, to accomplish by their concerted action the unlawful object of the conspiracy. Such an agreement is generally a matter of inference, deduced from the acts of the person accused, done in pursuance of their apparent criminal purpose.

Now, it is not necessary that each party to the agreement know the identity of all the other members of the conspiracy or have direct contact with all such members, or know all the details of the conspiracy and the exact parts to be played by his fellow conspirators. This is because a conspiracy may contemplate a chain of acts, to accomplish its objective, and the act of any given member or members of the conspiracy may be only one link in that chain.

Before a jury may find that a defendant or any other person has become a member of the conspiracy, the evidence in the case must show, beyond a reasonable doubt, that the conspiracy was knowingly formed and that the defendant or other person who is claimed to have been a member wilfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate wilfully means to act or participate voluntarily and intentionally and with a specific intent to do something the law forbids, or with a specific intent to fail to do something the law requires to be done. So, if a defendant or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he therefore becomes a wilful participant. That is, a conspirator, one who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

Now, in determining whether a conspiracy existed, the jury should consider the actions and declarations of all the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and his statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of the members.

Whenever it appears, beyond a reasonable doubt, from the evidence in the case that a conspiracy does exist or has existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done by any other member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in the furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of court by one person may not be considered as evidence against any person who is not present and who did not hear the statement made or see the act done.

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Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them.

As I indicated to you before, the conspiracy, the agreement is seldom, if ever, in writing and it's generally a matter of inference which is to be deduced from the acts of the persons accused, done in pursuance of their apparent criminal purpose.

Now, there have been some arguments, ladies and gentlemen, about statements made by these defendants when they were arrested at JFK Airport and later to a certain FBI Agent. Let me say a word about the question of the voluntariness of the statements.

In this case evidence was submitted of statement made by the defendants Zvonko Busic, Petar Matanic and Frane Pesut which were self-incriminating. Such statements or admissions of material facts constituting the crimes charged may be considered by you only if voluntarily made by the particular defendant. Therefore you must carefully examine and scrutinize such statements and admissions as well as the surrounding circumstances under which they were given or made in order to determine whether they were voluntarily made. You, in this connection, should determine whether the statements were coerced or pressured from these defendants because of fear of harm or any other reason or whether in fact they were voluntarily made without any coercion and after the defendants were given a full statement of their rights to remain silent. If you find that the statements or admissions were voluntarily made you should give such statements or admissions such weight as you as the jury feel they deserve under all the circumstances.

If, on the other hand, you have a reasonable doubt that the statements or admissions were not voluntarily made but were made under coercion and pressure then you should disregard those statements or give them only such consideration as you think they might deserve, considering or determining whether they have any reliability at all.

You should remember that the law does not impose upon a defendant in a criminal case the burden of duty of calling any witnesses or producing any evidence .

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Referring to statements which were made by Frane Pesut, you will remember that Special Agent Marun testified that he and Special Agent Westoff (phonetic) arrested Pesut and placed him in an FBI car driven by Special Agent Drawniok which brought him to the 69th Street headquarters of the FBI for interrogation. You will also remember the testimony of Special Agent Marun that Pesut stated in the automobile on the way to FBI Headquarters that "There is no problem here, this was not a crime, it was a political act," and that he understood the rights read to him by Westoff from the Advice of Rights Form, and stated, "I want to tell you what happened" i. English. At Headquarters Durdak questioned Pesut in what Durdak claims was the Serbo-Croation language and Pesut answered the questions in what Durdak claims was the Croation language. Durdak testified that when Pesut answered pursuant to Durdak's questions Durdak translated the answers to the questions to Special Agent Marun who took notes thereof and subsequently reduced them to a report #302. Durdak testified as to the admissions and statements made to him by Pesut in Croation.

Pesut denies he made these statements to Hentoff in English as testified to by Special Agent Narum or that he made any of the statements attributed to him by Durdak in the Croation language. He claims he didn't understand what Durdak was asking him and he did not give those answers in Croation. He bases his claim among other things upon his assertion that Durdak does not speak Croation, but rather some type of language which is not understandable by him.

Now, in support of this claim Pesut offered the testimony of William Derbyshire, who is a Professor of Slavic Languages, Literature and Linguistics at Rutgers University. Professor Derbyshire had examined Exhibit CK which was Durdak's translation from English into what Durdak said was Serbo-Croation of the Advice of Rights form including the waiver of rights. He had also questioned Pesut to ascertain Pesut's ability to understand Durdak's questions to Pesut and Durdak's ability to understand and translate Pesut's answers to those questions. Consequently, he stated that in his opinion Pesut could not understand Durdak and that Pesut did not give the statements to which

Durdak testified. He further testified that it was his opinion that Pesut could understand practically no English.

In this connection the jury may consider that this is opinion evidence and that Professor Derbyshire's testimony concerning Pesut's ability was based in part on statements Pesut made to the Professor because Derbyshire was not in the interview room when the answers were given, but Professor Derbyshire testified that he was not relying on the truth of the statements made to him by Pesut. And upon this issue you may consider the testimony of Durdak and Marun, who was in the room at the time Pesut was interrogated by Durdak.

Now, it will be your recollection of his testimony that controls, and it for you to decide beyond a reasonable doubt whether Pesut made the statements in question and whether he acted voluntarily in signing the waiver of rights. Should you determine that the statements testified to by Durdak as having been made by Pesut were not actually made by Pesut, or that they were not voluntarily made or that Pesut did not understand the waiver of rights he signed, then you should disregard the statements and waiver of rights entirely in your determination of whether the Defendant Frane Pesut committed the offense as charged in the indictment.

We have some defenses imposed by some of the defendants of coercion.

Evidence has been introduced by the Defendants Petar Metanic and Frane Pesut to the effect that after they boarded the plane they were ordered to follow and did follow the instructions of Zvonko Busic for fear of a catastrophe which might result if they disobeyed. As I stated before, the crimes charged must have been committed with intent to commit the same. If you find that a defendant did not intend to do what he or she did because he or she was subject to coercion or compulsion, then he or she has a legal excuse for the crime charged. But to provide a legal excuse for any criminal conduct, compulsion or coercion must be more than a general fear or apprehension of danger, and must be of such a nature as to induce a well founded fear of impending serious bodily injury to himself or to another without a reasonable opportunity to escape without committing the crime or without a reasonable opportunity to seek protection of the Government. But a fear that is unreasonable or unjustified by the circumstances is not sufficient to constitute a basis for the defense of coercion. Nothing less than a threat of force or its actual use will constitute a basis for the defense of coercion. Now, a desire to comply with another's instruction without his use of force or threat of serious bodily harm to himself or another is not sufficient as a legal excuse and is not coercion or compulsion. Likewise, a personal admiration of another, or a personal or emotional relationship with another, is no justification for compliance with an order or request by that other person to commit a criminal act, nor is it sufficient to create a lack of intent, by itself, to commit such an act, nor is it sufficient to constitute coercion to commit such an act.

If you find that the Government has proven beyond a reasonable doubt that one or more of the defendants committed all of the elements of any one or more of the three crimes charged, then I must instruct you further that the law does not recognize as a defense to any of the crimes here charged that the defendants were motivated to commit their acts by sincere political or moral convictions or in obedience to some higher law.

"Good motive alone is never a defense where the act done is a crime. One may not commit a crime and be excused from criminal liability because he or she desires or expected that ultimate good would result from his or her criminal act. Moreover, if one commits a crime under the belief, however sincere, that his or her conduct was politically or morally required, that is no defense to the commission of a crime.

So here it is no defense to the crimes charged that the conduct of the defendants or any one of them may have been motivated by the highest moral principles for the purpose of advocating Croation independence from Yugoslavian domination or for the purpose of protesting against the absence of freedom and the presence of brutality resulting from the coercion of the Yugoslavian government and its agents. Therefore, if you find beyond a reasonable doubt that a defendant had the required intent and knowledge to commit one or more of the offenses with which he or she is charged, then it is no defense that he or she acted with a sincere, patriotic Croatian motive or that he or she believed his or her intent was justified by some higher law.

We have some questions raised by counsel for Mr. Pesut concerning his identification at Grand Central Station.

Now, as part of its proof against the Defendant Frane Pesut for all counts the Government introduced evidence evidence showing that Pesut was present in Grand Central Station in the early morning of September 8th, 1976. An identification question may arise from any situation in which a defendant has been identified by a person outside of court, prior to trial, and that person is presented as a witness at the trial for the purpose of identification. Identification testimony is an expression of belief or an impression of the witness of what he saw. Identification testimony must be examined and scrutinized with great care. Its value depends on the opportunity the witness had to observe the person at the time in question and to make a reliable identification later.

The Defendant Pesut raises a question as to the accuracy of the identification of him by

Mr. Core and Mr. Bracaglia, two persons you heard testify that they saw Mr. Pesut at Grand Central Station on the early morning of September 8th at about 1:15 A.M. inquiring of them about the safety of the lockers at Grand Central Station and the nearest exit from the station.

The witnesses Core and Bracaglia, as you will recall, testified that they were leaving their place of employment, O'Henry's Filmworks, Grand Central STation when the person they subsequently identified as the Defendant Pesut approached them on September 8th in the early morning inquiring about the safety of the lockers in Grand Central Station. In considering their testimony you may consider the following: (1) On the morning of September 13th both witnesses saw Pesut's picture in the New York Post newspaper and thereafter notified the police. (2) In response, Detective Begley and another policeman came to O'Henry's Filmworks and showed the witnesses a group of photographs and both of the witnesses picked out the photograph of Pesut as the person they saw on the early morning of September 8th. You shoul consider the circumstances of any such identific procedure in determining the reliability of the witness' identification. (3) Thereafter, on September 21st both of the witnesses identified the Defendant Pesut in a lineup which included all of the male defendants in this case, which took place at the New York County District Attorney's Office. In this connection you may consider the opportunity the two witnesses had to observe the person they identified in the lineup as the person they saw in Grand Central Station; and (4) finally, the witnesses' identified Pesut in this Court as the person they saw at Grand Central Station on the morning of September 8th.

Pesut denies that he is the person these witnesses claim they saw on the early morning of September 8th.

In appraising the testimony of these two witnesses, you should consider the following questions and factors:

(1) Are you convinced that the witnesses had the capacity and opportunity to observe the person they claim they saw? Whether a witness had an adequate opportunity to observe and the capacity to observe and make an accuratidentification will

be affected by such matters as how long or short a time was available, how close or far away the witness was at the time, how good were the lighting conditions, whether the witness had occasion in the past to see or know the person, whether the incident appeared to be significant or unusual to the witness at the time, whether the witness spoke to the person and whether the person spoke to the witness, and if so, for how long, whether the witness was under stress at the time, and how alert the witness was at the time.

And the second question: Are you satisfied that the subsequent identification by each of the two witnesses was the product of their own recollection and not the result of suggestion by anyone else?

Now, you may therefore consider the following:

(a) The length of time that elapsed between the presence of the person at Grand Central Station and the next opportunity of these two witnesses, Gore and Bracaglia, had to identify the Defendant Pesut, as a factor bearing on reliability of the identification; (b) that an identification made by picking the Defendant out of a group of similar individuals the generally more reliable than one which results from the presentation of the defendant alone to the witness or among a group of persons with significantly different appearances; and (c) any descriptions given by a witness which are inconsistent or which differ from the actual physical appearance of the person allegedly identified and also whether the witness gave different descriptions at different times.

Even if the police followed the most correct photographic identification procedures and showed the witnesses the pictures of a number of individuals without indicating whom the police suspect, there is some danger that the witnesses may make an incorrect identification. If there is an initial misidentification, then you must answer the question whether thereafter the witnesses retained in their memory the image of the photograph rather than the image of the person actually seen since under those circumstances the truthworthiness of subsequent lineup or courtroom identification is reduced.

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The testimony of the witnesses if they are positive of their identification may be considered by you, but does not relieve you of the duty to carefully consider their identification testimony, especially when it is the only testimony which directly supports the claims of identification. But it is not essential that the witness himself be free from doubt as to the correctness of his statement.

Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered by his testimony and consider whether he had any motive in testifying.

If after examining the testimony of these witnesses and all the circumstances under which they identified Pesut you have a reasonable doubt as to the accuracy of their identification, you should not consider such testimony at all for the purpose of placing Pesut at Grand Central Station at the time in question.

The Government's case against the defendants

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rests on both direct and circumstantial evidence.

What is circumstantial evidence?

Circumstantial evidence is evidence of a fact from which you may reasonably infer the existence or non-existence of another fact. For example, suppose you were in a room with no windows and a person comes into your home wearing a raincoat which is wet, carrying an umbrella which is wet, that would be circumstantial proof that it is raining outside even though you did not otherwise know it was raining outside and not had been outside yourself.

Or, to give you another illustration I often give, and perhaps a little closer to home right here in the courtroom, suppose juror number one were to ask Mr. Barbella here, the reporter, go to clerk number one for a pad and pencil in order to make some notes, and suppose after the jury took a recess you came back and another clerk, Mr. Grossman here whom we will call clerk number two, not clerk number one, and suppose that clerk number two, not clerk number one -- that is, not Mr. Barbella, whom the members of the jury first spoke, were to hand juror number one a pad of paper and a pencil, that would be clear circumstantial evidence that clerk number

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one -- that is, Mr. Barbella, had given juror number one's message to clerk number two -- that is, Mr. Crossman. That's circumstantial evidence, circumstantial that clerk number one had communicated with clerk number two though you had never seen him do so, had no evidence he did so. But the mere fact that clerk number two came, gave the message back, the pad and pencil to juror number one was circumstantial evidence that Clerk number one had spoken to clerk number two. As the words indicate, circumstantial evidence means evidence surrounding the incident and the details as to distinguish from direct personal observation. That is more fundamentally different from mere conjecture or mere surmise; for under our law no man can be or is to be convicted on the basis of simply guess work or speculation.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case. An inference that is reasonably drawn from the facts testified to is evidence. In analyzing the evidence you may draw reasonable inferences based upon your own common sense and general experience from any facts that you find were proved. When two inferences may be drawn from a proven fact, one consistent with guilt and one consistent with innocence, you must draw the inference of innocence. A logical inference is to be distinguished from sheer speculation or mere suspicion.

Circumstantial evidence is legal and acceptable evidence. It is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. Circumstantial evidence may consist of an accumulation of many details which are so logically interrelated and so consistent with each other, and so inherently probable, that you may not have the slightest doubt as to its truthfulness and accuracy. As a general rule, the law makes no distinction between direct and circumstantial evidence.

Circumstantial evidence may be enough to convict, but the circumstantial evidence must be so convincing that it leaves you with no reasonable doubt. If you have a reasonable doubt after you

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consider all the circumstantial and other evidence as to any of these defendants, you must acquit him or her.

In this case the defendants, Zvonko Busic, Julienne Busic, Petar Matanic and Frane Pesut all testified. They took the stand. A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness. And there is no obligation for compulsion on a defendant to testify, but when he or she takes the stand and does testify, his or her credibility is tested by all the same rules and guides that any other witnesses are tested by.

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In weighing a defendant's testimony, you may consider the fact that he or she has a vital interest in the outcome of this trial. And you may also consider and take into account the probabilities or improbabilities of the testimony of any of these defendants.

There were certain character witnesses that were also introduced into this trial. One on trial in a criminal case is entitled to introduce evidence concerning his or her reputation for honesty, integrity, veracity, and that he or she is a law abiding citizen. The Defendant Julienne Busic, Petar Metanic and Frane Pesut, have produced evidence concerning their respective reputations for honesty, integrity, veracity and that they are law abiding citizens. However, the offered evidence of good reputation for truthfulness, veracity or honesty and integrity, or as a law abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury will also bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any testimony or evidence or exhibits.

There was some testimony of some experts, if you will recall. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession or calling, may state an opinion as to relative and material matters, in which they profess to be expert, and may also state their reasons for the opinion. Four expert witnesses were called in this case: Sergeant Terrence McTigue, I think would qualify as an expert, although he testified with respect to facts which he witnessed, Doctor Dominic DiMaio, Dennis Canfield and Professor William Derbyshire.

You should consider each expressed opinion received in evidence in this case, and give them such weight as you may think they deserve. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion of any expert are not sound, or that the opinions are outweighed by other evidence, you may disregard the opinions entirely.

We come now to a definition of "reasonable doubt," which frankly is a little difficult to define. The term "reasonable doubt" as used in this charge does not mean just any possible doubt that you might have, but it means such a reasonable doubt as careful and prudent and reasonable men or women ought to entertain in the circumstances proved. It means a doubt based on reason, and which is reasonable in view of all the evidence. The key word is "reasonable." A reasonable doubt may arise from the evidence produced from the lack of the evidence in the case. It is the obligation of the Government to prove a defendant guilty beyond a reasonable doubt, but it is not required to prove a defendant guilty beyond a shadow of a doubt. It is rarely possible to prove anything to an absolute certainty or beyond a possible doubt. Seldom can one prove a controversial fact with mathematical certainty. A reasonable doubt does not mean a vain, a fanciful, vague, or whimsical or imaginary doubt, nor does it mean a possible doubt created by a reluctance on the part of the jury to perform an unpleasant task. It means a doubt arising out of the evidence or lack of evidence which is a reasonable doubt. A reasonable doubt is a doubt that would cause prudent men to hesitate to act in matters of importance to themselves. A reasonable doubt is a doubt which appeals to your reason, and appeals to your judgment, and appeals to your common sense, and appeals to your understanding, and arises from the state of the evidence or the lack of evidence. A defendant is not to be convicted on suspicion or conjecture or evidence which does not persuade you beyond a reasonable doubt. On the other hand, proof beyond a reasonable doubt does not mean proof to a positive certainty or beyond all possible doubt. If the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury should adopt the conclusion of innocence.

Thus, you look at all the evidence introduced in this case and you ask yourselves whether or not you are satisfied beyond a reasonable doubt that the offenses have been committed as charged in this indictment. If you are so satisfied, then it will be your plain duty to convict the defendant or the defendants who have committed the offenses. But if there exists in your minds a reasonable doubt of the defendant's or defendants' guilt, you must give the defendant or defendants, as the case may be, the benefit of that doubt and acquit that defendant or defendants, as the case may be.

So with this case where there is more than one defendant, you must consider the innocence or the guild of each defendant separately.

Now, the question of reasonable doubt is one which can be determined only by you. It cannot be determined by arguments or opinion of counsel. In reaching a conclusion with respect to reasonable doubt you must consider all the evidence together, not just a particular segment or portion of the evidence which might be isolated from the rest of the evidence.

In considering all of this evidence, you will exercise the exclusive function of passing upon the credibility of witnesses. Now, you can see that this is a very important function, because to determine where the truth lies you must of necessity decide who is telling the truth. How you are to do this is going to be left to your own determination. Among other things, in determining the credibility of a witness, the jury may consider his or her motive in testifying, his or her manner or demeanor on the witness stand, his or her interest, prejudice or bias, if any, whether he or she has a purpose or interest to serve which might color his or her testimony. Interest does not necessarily mean that a witness is untruthful. It is merely an element that you may consider in reaching your determination, upon the question of whether he or she is telling the truth. You consider the witness' demeanor; to use a colloquial expression, you "size him up" or you "size her up", when he or she tells you anything, and you decide whether he or she strikes you as a fair and candid witness, or whether he or she strikes you as a person not telling the truth, either intentionally or unintentionally. You may also consider the witness' intelligence, his or her state of mind, his or her ability to observe the matters as to which he or she testified, and whether he or she impresses you as having a fairly accurate recollection of these matters.

You should also consider the inherent probability or improbability of a witness' testimony, and of course you should consider the inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses. Such inconsistencies or discrepancies may or may not cause you to discredit a witness' testimony.

Two or more persons witnessing an incident or a transaction may see or hear it differently and remember it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. Moreover, it is not uncommon for a witness to fail to remember the exact time of the day or the exact day of an event or transaction which occurred some time ago, nor to remember unimportant or insignificant details of an event. You decide whether misrecollection of such details is innocent misrecollection or intentional.

In weighing the effect of inconsistency or a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and also whether the inconsistency or discrepancy results from innocent error or intentional falsehood, and whether the discrepancy referred to is material or immaterial in this case.

Of course, another consideration is whether or not the witness has been contradicted by other credible evidence, and whether or not he or she has made statements at other times and places under oath or otherwise, which contradicted or are contrary to those made by him or her on the witness stand.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right -- you have a right to distrust such witness' testimony in other particulars; and you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

As to the latter, you should consider whether any prior inconsistent or contradictory statement conflicts with the testimony given by the witness with respect to material or immaterial matters, and to what extent, if any, they should be considered to effect the witness' credibility. In considering any prior inconsistent or contradictory statements made by a witness, or the conflict of any testimony the witness had given on the stand with the testimony he had given at some other time or before the Grand Jury, it is important to determine whether those inconsistencies or conflicts referred to material or essential portions of the testimony or to immaterial and unimportant details of his or her story, and to what extent, if any, they affect the credibility of the witness as to the facts in the case. In other words, you decide what is important and what is not important, regardless of any statements made by counsel.

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Now, in determining where the truth lies, again you must rely on your common sense. You cannot use your imagination, unsupported by any evidence, to determine what actually did happen. There cannot be, of course, any guesswork in the determination of the facts. But you have the right to draw inferences from the evidence, but only from the evidence.

The jury is not bound to believe inherently improbable or unreasonable statements made by any witness, just because the witness who made them was under oath.

The jury has a right in appraising a particular witness' credibility, as to all or part of his or her testimony, to consider the probability or the improbability of that testimony when viewed in the light of all of the circumstances and other evidence in this case.

If you find that any witness has knowingly testified falsely as to a material fact, you may disregard the entire testimony of that witness; or you may accept that which you believe to be true and disregard the balance. If you disregard his or her testimony altogether, and the guilt of any defendant is dependent on such testimony, then you

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must acquit that defendant.

Ladies and gentlemen, it is for you to determine whether a witness, whoever he or she may be, is telling the truth as to all the facts, or only with respect to some of the facts, or whether he or she is telling the truth at all. The test as to whether you believe a witness is the same test which you apply in your everyday business or in your home affairs, where you are called upon to make a similar determination every day. Do not think, members of the jury, that when you came into this jury box and were sworn as jurors, that it was supposed that you would lay aside your business or everyday experience. That is not so. In fact, you now are being called upon to use that business or everyday experience to assist you in determining any conflict in the testimony in this case. You are the exclusive judges in determining where the truth lies.

In this case some of the witnesses are not telling the truth, either intentionally or innocently, and it is for you to determine who is telling the truth and who is not.

You have been chosen and you have been sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" plea of the accused.

Now let your verdict be without any prejudice, without any bias, and without any sympathy. You are a fact-finding body and it is your duty to decide whether the acts charged in the indictment, have been committed beyond a reasonable doubt, and you are to perform this duty without fear, without bias or prejudice as to any party. The law does not permit jurors to be governed by fear or by sympathy or by prejudice or by public opinion. In arriving at your decision you should consider the evidence in light of your experience and by the exercise of your own knowledge and by the exercise of your own common sense. You must not permit any plea of sympathy to enter your verdict. The accused and the public expect that you will carefully and impartially consider all the evidence, following the law as stated by the Court, and reach a just verdict without fear or sympathy, regardless of the consequences.

While you must not surrender your conscientious

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opinion, ladies and gentlemen, you must not be stubborn. You must keep your mind open to reason.

In conclusion, let me say it is your duty to weigh again the evidence dispassionately, carefully, calmly, and to reach a conclusion about this case as to the facts which are wholly within your finding.

The only question for your consideration is whether the defendant or the defendants is or are guilty or innocent of the offenses for which he or she is on trial. If you are satisfied beyond a reasonable doubt that a defendant is guilty, it is your plain duty to convict. If you have a reasonable doubt about the matter, it is equally your plain duty to acquit.

Now, the punishment provided by law is a matter exclusively within the province of the Court. You cannot and you should not allow consideration of any possible punishment, which may be imposed on a defendant if he is found guilty, to influence you in arriving at an impartial verdict as to the guilt or innocence of a defendant. It is for the Court to determine any mitigating or any other special circumstances which may require consideration in the

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case, if a defendant is found guilty. So you should not be concerned with the question of punishment at all.

Now, ladies and gentlemen, all twelve of you must agree, whichever way you find. In other words, your verdict must be unanimous. You must take each count of the indictment and you must determine the guilt or innocence of each of the defendants with respect to each count.

Now, the form of your verdict should be, depending upon how you find, "We the jury find the defendant Zvonko Busic not guilty on Count 1" or "We the jury find the defendant Zvonko Busic guilty on Count 1," so that you repeat this procedure on each count with respect to each defendant and return a verdict of guilty or not guilty, as I said before, on each count with respect to each defendant named in that count.

Now, if you wish any testimony of any witness to be read to you or if you have any further questions, please send a note to the marshal who will relay your request to me.

Of course, jury service, as I indicated before is not always pleasant and particularly when it

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takes five weeks it is really inconvenient. Jury service, however, is one of the keystones of our American justice and democratic government. I want to thank each and every one of you for your outstanding devotion, as citizens, to your important work as jurors.

May you, acting in accordance with the evidence and the law, by your verdict declare the truth and proclaim the cause of righteousness and justice.

Upon retiring to the jury room, you will select one of your member to act as your foreperson. The foreperson will preside over your deliberations and be your spokesman here in court.

At this time I am not sending the exhibits which have been received in evidence with you as you retire for your deliberations.

You're entitled, however, to see any or all of these exhibits. I suggest, therefore, that you begin your deliberations and then if it be helpful to you, you may ask for any or all of the exhibits by simply sending a note from the foreperson to me through one of the bailiffs or marshals. If after you have retired you desire to be informed on a point of law arising in the case or to have any part of the testimony clarified, you should ask to be returned to the court for further instructions.

Now, at this point we will take a short recess in order that I may hear applications which will be made by counsel. I must ask you not to consider this case and not talk about it among yourselves until you are brought in at the end of this short recess.

We will take a short recess.

Ladies and gentlemen, there is one other thing I think I want to talk about:

I think I have already touched upon it. I talked about the interruption of Mr. Bergman last night and there is only one other that I checked on -- I checked on all of them. I have only one comment to make. Mr. Bergman began by saying, if you recall, that this was the last chance you had to consider this case and once you considered this case, there wll be no chance to come back, et cetera, et cetera. I indicated, I think upon the objection of Mr. Schlam, that that was not proper. I think I used the words that it might be considered intimidation. It is not intimidation. A lawyer

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in summing up has the right to say that this is the last time you will have to pass upon the case. You all know that anyway. It is not intimidation and I want to make that clear, in all fairness to Mr. Bergman.

One other matter, in the course of the trial there was certain evidence that was taken subject to connection. I have found that all of that evidence has been connected and you consider it.

We will now take a 10-minute recess.

(Jury leaves courtroom.)

MR. TIGAR: To begin with, your Honor, we will not argue at length our objections based upon the Court's failure to give the charges which we have requested during the trial.

THE COURT: Yes, I think you protected the record. I made it clear --

MR. RUDOLF: As to all of us.

THE COURT: -- whether I denied your requests or not, you have it on the record and you can send it to the Court of Appeals if you are unfortunate enough to lose. I want to know what is in this charge that has not already been presented to you.

MR. TIGAR: I am limiting my remarks, as the Court sees by my leafing through --

THE COURT: We have given you parts of this charge before.

MR. TIGAR: Portions of it have been given, yes.

I will not repeat any objections that we made with respect to the parts that we have. With respect to page 22, knowledge and intent, the second full paragraph --

THE COURT: Yes.

MR. TIGAR: -- I think it unduly favors the Government and I believe that it should have read something to the effect:

The proof of this element of knowledge and wrongful intent may rest on evidence of facts and circumstances from which one can make a reasonable and logical inference as to whether a defendant intended to commit the specific offenses charged.

THE COURT: I won't make that change. I think it is a clear and fair charge on that point.

MR. TIGAR: I have a similar objection, your Honor, with respect to page 23, the sentence that begins, "No person --"

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THE COURT: Yes.

MR. TIGAR: I think that a reasonable man is not the standard. The question is whether the defendant possessed the intent required.

MR. BERGMAN: Your Honor --

MR. TIGAR: I would omit that entirely.

MR. BERGMAN: If Mr. Tigar is finished with this particular charge, I would like to make a couple of comments on it too.

THE COURT: On this point?

MR. BERGMAN: On the knowledge and intent.

THE COURT: I think this statement has been in cases for many years and has been recently, I think, incorporated in one of the Court of Appeals decision.

Mr. Schlam or Mr. Korman, do you have any objection to excluding that?

MR. KORMAN: I do not see what is wrong with it.

(continued next page)

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

PIERCE O'DONNELL, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On September 30, 1977, I served the Brief for Defendants-Appellants Zvonko Busic and Julienne Busic and the Joint Appendix.

3. Service was effected by depositing two copies each of the Brief for Defendants-Appellants Zvonko Busic and Julienne Busic and the Joint Appendix, first class, postage prepaid, in the United States Mails at Washington, D. C. as follows:

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PIERCE O'DONNELL

Subscribed and sworn to before me this 30th day of September, 1977.

Notary Public

MY COMMISSION EXPIRES JANUARY 31, 1981